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Who's Keeping Score?: Oversight of Changing Consumer Credit Infrastructure

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Access to credit in the United States is contingent upon an individual obtaining the "right" credit score. Yet the opaque scoring system makes it nearly impossible for an individual to break out of a cycle of low credit ratings and participate in the benefits of the American economy. Partially as a response, alternative credit rating products now use personal nonfinancial data for automated credit decision-making, purportedly intended to expand access to credit. Social media activity, college grades, and even what time of day a person applies for a loan are examples of data points used for this purpose. However, these and other alternative data can be highly correlated with protected traits, such as race and national origin. While extending access to credit equitably across society is an important goal, the cure should not exacerbate the same inequalities that it is designed to address. The necessity of credit for the modern consumer compels continued oversight of the credit infrastructure to ensure fair data practices and to hold participants accountable. This article contends that consumer access to a fair credit score is a necessity, and that the consumer credit infrastructure should be viewed as a modern utility and subject to additional oversight. A proposal is then advanced that establishes fair data duties for credit scoring entities.

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Introduction

Imagine how anxiety levels would increase if students taking the SAT exam knew that their scores would be used to determine their creditworthiness in the future. Yet, SAT scores are among the variables that at least one company uses to predict credit risk, even though multiple universities have stopped using the SAT for admissions due to concerns that the exam is racially and ethnically biased.[1] Many Americans understand the importance of maintaining a top-tier credit rating, but are unaware of the scope of personal data that can feed into the creation of those ratings, and how large datasets of nonfinancial data are being used to produce a ranking that will determine their access to credit and credit terms. Even in the traditional credit reporting and scoring system, Americans, in large part, neither consent to nor have the right to opt out of data collection, which may start in childhood.[2] Far from viewing this early practice as unacceptable, one of the credit agencies recommends, "If your child has a credit report containing only accurate information, you don't have to do anything. Let the positivity build!"[3] Thus begins the lifelong story of individuals as involuntary data sources.

While some segments of the population are building credit files from childhood, a distinct and enduring problem exists at the other end of the spectrum. Approximately 26 million Americans have *no* credit history,

[1]Katherine Welback & Ben Kaufman, *Fintech Lenders' Responses to Senate Probe Heighten Fears of Educational Redlining*, Student Borrower Protection Ctr. (July 31, 2020), https://protectborrowers.org/fintech-lenders-response-to-senate-probe-heightens-fears-of-educational-redlining/ (contending that Upstart's use of SAT scores in making credit determinations ignores the extensive body of research that indicates such tests are "flawed, biased, and causally related to systematic discrimination").

[2]In the wake of the Equifax hack that affected 145.5 million Americans, the credit reporting agencies again came under fire for profiting from data collection that occurs without the consent of consumers. AnnaMaria Andriotis et al., *Senators Rip Credit-Reporting Model in Wake of Equifax Breach*, Wall St. J. (Oct. 4, 2017, 4:46 p.m.), https://www.wsj.com/articles/senators-rip-credit-reporting-model-in-wake-of-equifax-breach-1507136171. This involuntary data collection begins during childhood, leaving even young children vulnerable to identify theft. According to one study, more than one million children were victims of identity fraud in 2017, and two-thirds of the victims were younger than eight. Al Pascual & Kyle Marchini, *2018 Child Identity Fraud Study*, Javelin (Apr. 24, 2018), https://www.javelinstrategy.com/print/58511.

[3]Erica Sandberg, *Does My Child Have a Credit Report?*, Experian (Aug. 16, 2019), https://www.experian.com/blogs/ask-experian/does-your-child-have-a-credit-report/.

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and an additional 19 million have such limited history that they are unscorable by the rating agencies.[4] Obtaining a credit score is, therefore, a catch-22 for many first-time loan applicants. To obtain a credit score, an individual must have credit history and to qualify for most loans, she must have a credit score.[5]

Traditional credit scoring entities recommend that to increase a score an individual should take actions to either incur debt or to increase current credit lines.[6] While these steps may establish a credit history, they may also cause financial instability for individuals with insufficient means to repay, especially due to the high interest rates and harsh terms that are the only available choices for those who are unscored. Counterintuitively, the steps to improve a credit score may hamper an individual's ability to repay future debt, and the downward credit spiral continues.

Furthermore, scoring differences can be traced in large part to historic discrimination and are a significant contributor to widening wealth disparities. Scoring variables are so hopelessly intertwined with historic discrimination that their use continues to perpetuate economic disadvantage.[7] The importance of accurate and widely available individual credit ratings is difficult to overstate and is a bi-partisan issue. As Representative Tim Scott, a Republican, has opined, "Having access to

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[4]CFPB, Data Point: Credit Invisibles 6 (2015), https://files.consumerfinance.gov/f/201505_cfpb_data-point-credit-invisibles.pdf. Credit scores are discussed in more detail in Part I.

[5]*See*, for example, Ismat Mangla, *How to Improve Your Credit Score Fast*, Experian (Dec. 18, 2018), https://medium.com/@Experian/how-to-improve-your-credit-score-fast-237c1414c457; Erin El Issa & Bev O'Shea, *How to Build Credit*, NerdWallet (Aug. 3, 2021), https://www.nerdwallet.com/article/finance/how-to-build-credit; Kim Porter, *A Complete List of Ways to Build Credit*, U.S. News (Apr. 27, 2020, 1:51 p.m.), https://creditcards.usnews.com/articles/a-complete-list-of-ways-to-build-credit.

[6]Advice on how to build credit abounds on the Internet. Experian's website recommends the following actions: open a credit card account, obtain a secured credit card, open a joint credit card account, request a credit limit increase, pay student loans diligently, take out an auto installment loan, obtain a secured loan, seek out nonprofit lending circles, and request a landlord to report payment history. Stefan Stolba, *How to Build Credit*, Experian (Apr. 9, 2021), https://www.experian.com/blogs/ask-experian/credit-education/improving-credit/building-credit/.

[7]Terri Friedline, Banking on a Revolution: Why Financial Technology Won't Save a Broken System 24 (2020).

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credit is like having access to a better life."[8] In June 2021, the House Committee on Financial Services held a hearing entitled, "A Biased, Broken System: Examining Proposals to Overhaul Credit Reporting to Achieve Equity."[9] Chairwoman Maxine Waters, a Democrat, stated "Good credit is a gateway to wealth. Yet, for far too long, our credit reporting system has kept people of color and low-income persons from access to capital to start a small business; from access to mortgage loans to become homeowners; and from access to credit to meet financial emergencies."[10]

The worthwhile search for a solution, together with the search for increased profitability, has led to the collection and use of *alternative* credit data, including the SAT scores mentioned in the earlier example. Consumer reporting agencies (CRAs) and financial technology (fintech) companies that operate outside of the banking and credit industries are increasingly using data that extend beyond traditional credit history in a quest to find "visibility" for the unbanked and to better predict credit risk for all individuals.[11] These data are generally referred to as alternative credit data.

Not all alternative credit data, however, are created equal. Some alternative data streams include risk-related information about on-time utility and rent payments, for example. While the National Consumer Law Center is cautiously optimistic about the carefully designed use of this

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[8]Jennifer Streaks, *Black Families Have 10 Times Less Wealth Than Whites and the Gap Is Widening—Here's Why*, CNBC (May 18, 2018, 1:04 p.m.), https://www.cnbc.com/2018/05/18/credit-inequality-contributes-to-the-racial-wealth-gap.html.

[9]*Hybrid Hearing—A Biased, Broken System: Examining Proposals to Overhaul Credit Reporting to Achieve Equity*, 117th Cong. (2021), https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=407957.

[10]Press Release, Maxine Waters, Chairwoman, U.S. House Committee on Financial Services, Waters at Hearing on Overhauling Credit Reporting System: We Need Big, Bold Legislative Solutions (June 29, 2021), https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=408090 (Congresswoman Waters noted that, "This issue is not a matter of personal failings. This is about a failed system.").

[11]Ethan Loufield, Dennis Ferenzy, Tess Johnson, Ctr. for Fin. Inclusion & Inst. of Int'l Fin., *Accelerating Financial Inclusion with New Data* 11 (2018), https://content.centerforfinancialinclusion.org/wp-content/uploads/sites/2/2018/08/AcceleratingFINewData_Final_2018.06.26.pdf.

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payment data to expand access to the underserved,[12] the data can still be personally intrusive and potentially discriminatory. Other types of alternative data are not financially related and are problematic, however, and include such information as social media use, location tracking, and purchase choices.[13]

This nonfinancially related, fringe alternative data is used to determine the scoring of individuals[14] based on correlations between behaviors and repayment risk, as revealed through algorithms and models that weigh hundreds, if not thousands, of data points to make predictions about creditworthiness. For example, certain lenders consider the timing of the application itself (a loan application submitted late at night might be graded riskier than an application submitted during the day) and location data (a loan application submitted from a high-crime area may be graded riskier than a loan from a low-crime area) to assess the riskiness of loans.[15] These data can be more harmful and insidious because they are based, at least in part, on lifestyles as proxies for whether a person will repay a debt.

The common challenge for all individuals, whether highly rated or without a credit rating, is their powerlessness in the credit rating system, combined with the industry's appetite for more data accumulation to use in both credit scoring algorithms and outside the credit scoring system. While federal laws protect consumers, in part, and prohibit credit discrimination, they do not address how powerful credit entities use alternative data forms in ways that create inferences about credit and other

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[12]*Examining the Use of Alternative Data in Underwriting and Credit Scoring to Expand Access to Credit: Hearing on Fin. Tech.*, 116th Cong. (2019), https://financialservices.house.gov/uploadedfiles/hhrg-116-ba00-wstate-wuc-20190725.pdf [hereinafter *Alternative Data Hearing*] (testimony of Chi Chi Wu, Staff Att'y, Nat'l Consumer Law Ctr.).

[13]Robinson & Yu, Knowing the Score: New Data, Underwriting, and Marketing in the Consumer Credit Marketplace 4 fig. 1 (2014), https://www.upturn.org/static/files/Knowing_the_Score_Oct_2014_v1_1.pdf [https://perma.cc/C5PJ-3H3G] [hereinafter Robinson & Yu Report] (showing that fringe data, such as government records, shopping habits, social media activity, location data, and web activity tracking, flow into fringe alternative scoring models).

[14]Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 Wash. L. Rev. 1, 2–3 (2014).

[15]Julapa Jagtiana & Catherine Lemieux, *The Roles of Alternative Data and Machine Learning in Fintech Lending: Evidence from the LendingClub Consumer Platform*, 48 Fin. Mgmt. 1009, 1015 (2019).

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risks. While innovative new credit assessments using different data could open the credit system to deserving consumers,[16] consumer advocates warn that without regulation, "alternative data sources may just end up creating new ways to replicate the same legacy of discrimination that's already baked into a lot of the socioeconomic structures in our society."[17] This concern is greatly amplified by the fact that credit scores are not only used to make loan decisions; they are also used to determine insurance rates, employment decisions, and may even be used in health treatment algorithms.[18]

Multiple legislative proposals have sought to address structural problems with the credit rating industry but have not yet garnered sufficient support for adoption.[19] One legislative proposal, for example, would shift responsibility to consumers by granting individuals the right to opt out of data collection, including credit data, entirely, essentially allowing them to "go off the grid" with respect to their data.[20] In its traditional use, this phrase refers to disconnecting from the network used to transfer electricity from producers to consumers. Though there may be a few privileged individuals who have the resources to live outside an electric grid, access to electricity is a necessity for most, and its provision is considered a utility. The same is true of consumer credit data.

Even if individuals had the ability to opt out of data collection, similar to the right granted by the General Data Protection Regulation (GDPR)

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[16]*See*, for example, CFPB, TASKFORCE ON FEDERAL CONSUMER FINANCIAL LAW 619–21 (2021), https://files.consumerfinance.gov/f/documents/cfpb_taskforce-federal-consumer-financial-law_report-volume-1_2021-01.pdf [hereinafter CFPB TASKFORCE REPORT VOLUME II] (recognizing the potential of alternative data to expand access to individuals previously considered uncreditworthy).

[17]Steven Melendez, *Now Wanted by Big Credit Bureaus Like Equifax: Your 'Alternative' Data*, FAST COMPANY (Apr. 6, 2019), https://www.fastcompany.com/90318224/now-wanted-by-equifax-and-other-credit-bureaus-your-alternative-data.

[18]CFPB, KEY DIMENSIONS AND PROCESSES IN THE U.S. CREDIT REPORTING SYSTEM: A REVIEW OF HOW THE NATION'S LARGEST CREDIT BUREAUS MANAGE CONSUMER DATA 5 (2012) [hereinafter CFPB KEY DIMENSIONS REPORT].

[19]For example, Representative Ayanna Pressley introduced legislation to provide additional credit protections for consumers; the legislation passed the House but was not voted on by the Senate. Comprehensive CREDIT Act of 2020, H.R. 3621, 116th Cong. (2019–2020) (as passed by the House, Jan. 29, 2020).

[20]*See*, for example, Consumer Online Privacy Rights Act, S. 2968, 116th Cong. § 105 (2019–2020).

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in the European Union,[21] opting out is not a feasible option for the vast majority of Americans. Most people need access to credit to buy a home or car, attend college or vocational training, start a business, and provide a safety net for unexpected financial strains. Much like connecting to the electrical grid, credit access is vital to an individual's fundamental well-being, and any choice to opt out is not a meaningful one. Thus, access to credit should be viewed as a *necessity* in the same way as access to electricity and other utilities is a necessity. Given that statutory responses have been unable to address technological changes quickly enough,[22] and access to credit is essential for economic survival, we argue that consumer credit rating systems should be subject to utility-like oversight.

Further, because nonfinancial alternative data used in new credit scoring products implicates civil and human rights related to privacy and autonomy, we propose adding civil rights fair data duties to the utility concept with respect to the use of alternative data. This data utility framework would shift the burden from enforcement by individual consumers to ex ante proactive duties that: (1) provide universal access to credit rating services, including consumer paths to improved credit ratings; (2) identify and mitigate discriminatory impact through disparate impact analysis that addresses algorithmic bias; (3) segment and protect alternative data from noncredit use; (4) explain and substantiate inferences of credit risk related to the data; (5) notify consumers of the use of alternative data for credit scoring and decisions; and (6) provide comparative credit scoring information. In our proposal, credit industry participants would be required to provide affirmative evidence to utility-type regulators that they meet these duties.

This article proceeds in three primary parts. Part I describes the evolution of the credit scoring system and why it has come full circle without fully addressing inequities. This part also discusses the growing practices

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[21]Council Directive 2016/679, art. 4, 2016 O.J. (L 119) 33 (EU) (concerning the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC).

[22]Moreover, the legislative process is inherently too slow and cannot adapt and respond in a meaningful way to complicated and evolving credit scoring systems. *See*, for example, Jeremy A. Carp, *Autonomous Vehicles: Problems and Principles for Future Regulation*, 4 U. Pa. J.L. & Pub. Affairs 81, 103–11 (2018); Ryan Hagemann et al., *Soft Law for Hard Problems: The Governance of Emerging Technologies in an Uncertain Future*, 17 Colo. Tech. L.J. 37, 63 (2018) ("Generally speaking, traditional regulatory processes tend to be quite rigid, bureaucratic, inflexible, and slow to adapt to new realities.").

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of using alternative data to generate credit scores. Part II analyzes problems with credit reporting and scoring that persist in spite of technological innovation and passage of laws and regulations. In Part III, we propose that access to a fundamentally fair credit score should be viewed as a necessity given the significant role these scores play in an individual's life in the United States. To mitigate private power and discrimination risk in the calculation and application of credit scoring, we argue that credit scoring should be subject to quasi-utility oversight, and credit industry participants should be subject to civil rights fair data duties with respect to the use of alternative data. Without these changes, alternative credit scoring will develop into a powerful surveillance tool that requires individuals to sacrifice important individual rights to gain access to credit.[23]

I. Evolution of the Credit Scoring System

In the eighteenth century, individuals and businesses obtained loans from lenders by asking well-regarded neighbors to vouch for their character.[24] With the passage of the Bankruptcy Act of 1841, which allowed debtors to file for bankruptcy voluntarily, lending based on reputation alone became a much riskier proposition.[25] Lenders began to rely less on word of mouth and more on information compiled by unrelated third parties.[26] Thus, the credit rating business began. The Retail Credit Company, founded in 1899, was a pioneer in the consumer credit reporting

[23]Friedline, *supra* note 7, at 4, 146; *see also* Shoshana Zuboff, The Age of Surveillance Capitalism 1 (2019) (defining surveillance capitalism as "[a] new economic order that claims human experience as free raw material for hidden commercial practices of extraction, prediction, and sales").

[24]*See* Josh Lauer, Creditworthy: A History of Consumer Surveillance and Financial Identity in America 266 (2017) (noting that up until the 1830s creditworthiness in America amounted to little more than public opinion); *see also* Sean Trainor, *The Long, Twisted History of Your Credit Score*, TIME (July 22, 2015, 7:00 a.m.), https://time.com/3961676/history-credit-scores/.

[25]Lauer, *supra* note 24, at 30 (noting that creditors sought more reliable information about borrowers after the passage of the Bankruptcy Act).

[26]In 1841, Lewis Tappan set out to solicit information about commercial debtors' character and assets from correspondents throughout the country, which information he then distilled into massive ledgers. *Id*. at 29.

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sector, and eventually developed credit files on millions of Americans, including information related to individuals' social, political, and sexual lives.[27] When Retail Credit revealed plans to digitize its records in the 1960s, an intense backlash resulted in congressional investigations and the passage of the Fair Credit Reporting Act of 1970 (FCRA), which, among other regulations, required credit bureaus to open their data to the public and to expunge data on race, sexuality, and disability.[28] Ironically, as discussed further in Part II, the use of social media and other types of alternative data in new credit scoring systems reverts back to the old way of inferring creditworthiness from social reputation.[29]

A. Credit Reporting Systems and Data Supply Chains

Retail Credit survived the backlash and changed its name to Equifax in 1975.[30] In time, TransUnion and Experian emerged as competitors and they are now collectively known as the "Big Three" of consumer credit reporting.[31] Equifax, TransUnion, Experian, and other consumer credit agencies (CRAs) maintain credit files[32] on individuals, and have traditionally relied on information provided by furnishers and public records searches.[33]

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[27]Trainor, *supra* note 24.

[28]Fair Credit Reporting Act, Pub. L. No. 91-508, 84 Stat. 1128 (1970) (codified as amended at 15 U.S.C. § 1681 (2018)).

[29]*See* Nizan Geslevich Packin & Yafit Lev-Aretz, *On Social Credit and the Right to Be Unnetworked*, 2016 Colum. Bus. L. Rev. 339, 360–65 (2016) (explaining the use of social media and social networking information in marketplace lending algorithms).

[30]Trainor, *supra* note 24.

[31]*Id*. Although the Big Three are referred to colloquially as "credit reporting agencies" or "credit bureaus," the FCRA, the primary Act that regulates the business of credit reporting, uses the term "consumer reporting agencies" to refer more generally to firms that prepare consumer reports based on individuals' financial transactions history data. 15 U.S.C. § 1681a(f) (2018). This article refers to these agencies as CRAs throughout.

[32]As defined by the FCRA, the "file" means "all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored." 15 U.S.C. § 1681a(g) (2018).

[33]CFPB Key Dimensions Report, *supra* note 18, at 8. Note, some CRAs specialize in data relating to payday loans, utility payments, medical information, employment history, residential history, check writing history, and insurance claims. *Id*. at 4. For a list of all CRAs, *see List of Consumer Reporting Companies*, CFPB 8–35 (2020), https://files.consumerfinance.gov/f/documents/cfpb_consumer-reporting-companies-list.pdf.

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Lenders, as furnishers, generally provide CRAs with information for each lending relationship, known as a trade line (e.g., auto loan, mortgage, credit card), which includes such information as credit limit, loan amount, account balance, account payment history, and account status.[34] Furnishers *voluntarily* provide this information and have discretion about the process of reporting, what information they choose to report, and to whom.[35] Based on public record searches, CRAs also maintain individual information relating to judgments, tax liens, and bankruptcy filings in their credit files.[36]

CRAs not only collect data, but they also provide reportable information from their credit files to end users, such as lenders or employers, in the form of consumer reports. A credit report, a type of consumer report, typically includes the consumer's identification information, reported credit account histories, credit inquires, and public filings.[37] Beyond use in lending decisions, consumer reports are utilized to determine eligibility for housing, set premiums for insurance policies, open checking accounts, and screen job applicants.[38] Based on the sale of consumer reports and other ancillary businesses, such as the sale of lists and noncredit information for marketing

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[34]A national CRA receives updates on over 1.3 billion trade lines in a typical month. CFPB Key Dimensions Report, *supra* note 18, at 21. The term furnisher is not defined in the FCRA but is generally understood to be an entity that reports information about consumers to CRAs. *Overview—for Furnishers of Data*, Consumer Data Indus. Assoc., https://www.cdiaonline.org/resources/furnishers-of-data-overview/ (last visited Jan. 17, 2021).

[35]CFPB Key Dimensions Report, *supra* note 18, at 5. For example, some furnishers only report uncollectible balances while others report all amounts owed. *Id*. Many CRAs, however, follow standardized reporting requirements approved by the Consumer Data Industry Association. Cong. Res. Serv., Consumer Credit Reporting, Credit Bureaus, Credit Scoring, and Related Policy Issues 5 (2020), https://fas.org/sgp/crs/misc/R44125.pdf. For example, furnishers are required to transmit bulk data to the national CRAs once every thirty days in an electronic industry-standard format called the Metro 2. *Metro 2 Format for Credit Reporting*, Consumer Data Industry Assoc., https://www.cdiaonline.org/resources/furnishers-of-data-overview/metro2-information/ (last visited Jan. 19, 2021).

[36]CFPB Key Dimensions Report, *supra* note 18, at 8. Primarily, CRAs obtain this information through LexisNexis Risk Data Retrieval Services LLC (LNRDRS). *Id*. at 17. LNRDRS sends 10–20 million public record events to the national CRAs each year. *Id*.

[37]*What's in Your Credit Report?*, myFICO, https://www.myfico.com/credit-education/whats-in-my-credit-report (last visited July 22, 2020).

[38]CFPB Key Dimensions Report, *supra* note 18, at 5.

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purposes, the credit reporting industry has grown into a multi-billion-dollar industry.[39]

B. Credit Scoring

Data from credit reports are fed into credit scoring models to determine an applicant's creditworthiness.[40] CRAs, lenders, and specialized scoring providers have developed proprietary analytical credit risk models that calculate these credit scores. Fair Isaac & Company (FICO) first introduced its models based on credit report data in 1990,[41] and it continues to provide the substantial majority of third-party generic credit scores purchased by financial institutions for loan origination decisions.[42]

Creditors rely on credit scores in lending decisions to improve efficiency and reduce costs. Without credit scoring, loan underwriting would be a much more time-consuming process.[43] Few institutions, however, rely solely on credit scores to make decisions. A lender will often establish a minimum score, under which applicants are denied credit, and a

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[39]*Id*. at 7. These ancillary businesses are discussed in more detail in Part II.

[40]A consumer score is a metric that can be used to predict a variety of financial behaviors. *Id*. at 5. To develop a scoring model, a scorer selects a random sample of customers and analyzes the sample to identify characteristics or variables that relate to risk. *Credit Scores*, FTC, https://www.consumer.ftc.gov/articles/0152-credit-scores#how (last visited Jan. 20, 2021). Each of the variables is then assigned a weight based on its strength as a predictor of creditworthiness. *Id*. FICO claims that its scores are calculated by weighting payment history 35%, amounts owed 30%, length of credit history 15%, new credit 10%, and credit mix 10%; however, it also states that "for some people, the importance of these categories can be different." *What's in My FICO Scores?*, MYFICO, https://www.myfico.com/credit-education/whats-in-your-credit-score (last visited Jan. 20, 2021).

[41]*Id*. at 10.

[42]CFPB KEY DIMENSIONS REPORT, *supra* note 18, at 10. VantageScore, a joint venture by the three national credit bureaus, later entered the market as a competitor to FICO in 2006. NAT'L CONSUMER LAW CTR., FAIR CREDIT REPORTING § 16.4.5.2 (9th ed. 2017). In spite of the competition, it is estimated that the FICO score is still used in calculations in 90% of consumer scoring. Alexandria White, *FICO Scores Are Used in 90% of U.S. Lending Decisions—Here's Where to Get Yours for Free*, CNBC (Mar. 19, 2021), https://www.cnbc.com/select/where-to-get-a-free-fico-score/.

[43]*See* ROBERT B. AVERY ET AL., CREDIT RISK, CREDIT SCORING, AND THE PERFORMANCE OF HOME MORTGAGES 627 (1996), https://www.federalreserve.gov/pubs/bulletin/1996/796lead.pdf (explaining that credit scoring models were developed to facilitate the underwriting process, which had been more time-consuming and costly as a subjective process).

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second minimum score, over which applicants are approved.[44] Traditionally, applications for individuals whose scores fall in between the two scores are manually reviewed.[45] New fintech lending companies, however, are working to replace human underwriters with machine learning algorithms to rate consumer risk of default and completely automate lending decisions.[46] These algorithms increasingly incorporate alternative data, which ranges from mainstream alternative data, such as cash flow payment data, to fringe alternative data, such as activity on social media platforms.[47]

C. The Alternative Credit Data Supply Chain

Fintech lenders are not alone in their efforts to analyze alternative data to better predict risk. CRAs, credit scoring entities, aggregators, and traditional lenders combine traditional credit data with alternative data to calculate alternative credit scores and new consumer risk assessments.[48] The flow of alternative credit data to and from the various market

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[44] Fed. Deposit Ins. Corp., Risk Management Manual of Examination Policies 76 (2020). Most systems provide for overrides of the established cut-offs. *Id*.

[45] *Id*.

[46] Anna Oleksyuk, *5 Uses of Machine Learning in Finance and FinTech*, Medium (Jan. 25, 2019), https://medium.com/@annoleksyuk/5-uses-of-machine-learning-in-finance-and-fintech-9cf4a7530695. Also, the Federal Housing Administration (FHA) announced a new automated underwriting system for single family mortgages in October of 2020. Press Release, Dep't. of Hous. & Urban Dev., FHA Launches New Automated Underwriting System for Single Family Forward Mortgages (Oct. 21, 2020), https://www.hud.gov/press/press_releases_media_advisories/HUD_No_20_179. In recent months, even the more traditional lenders have also been looking to incorporate alternative data in their underwriting models as well. One reason for this shift is that creditors have been more reluctant to rely solely on credit scores for lending decisions. The Coronavirus Aid, Relief and Economic Security (CARES) Act, signed into law on March 27, 2020, prohibits lenders from reporting delinquencies on credit obligations that they have agreed to defer, modify, or forebear during the pandemic. CARES Act, Pub. L. No. 116-136, § 4021 (2020). Some banks are, however, finding other ways to report that a loan is in forbearance, such as leaving check boxes blank or applying natural disaster codes to the accounts. AnnaMaria Andriotis, *"Flying Blind Into a Credit Storm": Widespread Deferrals Mean Banks Can't Tell Who's Creditworthy*, Wall St. J. (June 29, 2020), https://www.wsj.com/articles/flying-blind-into-a-credit-storm-widespread-deferrals-mean-banks-cant-tell-whos-creditworthy-11593423001?mod=searchresults&page=1&pos=3.

[47] Robinson & Yu Report, *supra* note 13, at 5 fig. 1.

[48] For example, TransUnion now offers the Credit Vision Link score, which combines alternative data and traditional credit data. *CreditVision Link*, TransUnion, https://www.transunion.com/product/creditvision-link (last visited Oct. 12, 2020).

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participants is circuitous and often difficult to follow.[49] Looking at the distinct categories of data, however, helps to break down the movement among participants. For example, credit data can be categorized as traditional (i.e., baseline), mainstream alternative, or fringe alternative.[50] Traditional data includes information found on credit reports, while mainstream alternative data includes utility and other regular payment histories. Fringe alternative data includes data from government records, shopping habits, social media activity, location data, and other web activity.[51] There are multiple methods for companies to gain access to both types of alternative data, as described in the following sections.

1. Consumer Permission

Some credit market participants collect and use alternative credit data with permission from consumers or at their direct request. Credit scorers offer scoring services that utilize an opt-in structure by asking consumers to grant permission for the scorer to access their checking, savings, or utility account histories directly.[52] For example, FICO has partnered with

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[49] *See* ROBINSON & YU REPORT, *supra* note 13, at 5 fig. 1 (depicting the flow of information into credit assessment models).

[50] *Id*. The use of mainstream alternative data has been met with a favorable regulatory response. In December 2019, five federal financial regulatory agencies issued a joint statement encouraging the responsible use of mainstream alternative data and recognizing that the use of such data could improve the speed and accuracy of credit decisions. Press Release, CFPB, Federal Regulators Issue Joint Statement on the Use of Alternative Data in Credit Underwriting (Dec. 3, 2019), https://www.consumerfinance.gov/about-us/newsroom/federal-regulators-issue-joint-statement-use-alternative-data-credit-underwriting/. The interagency statement specifically cites the use of cash flow data as presenting no greater compliance risk than traditional credit data because the data comes from a reliable source and is directly related to a consumer's finances. Kathleen Ryan, *The Big Brain in the Black Box*, ABA BANKING J. (May 4, 2020), https://bankingjournal.aba.com/2020/05/the-big-brain-in-the-black-box/. This statement served as a validation for banks that were already using alternative data and as a nudge for banks that have not yet done so. Penny Crosman, *"Out of the Shadows": Use of Alternative Data in Lending Gains Ground*, AM. BANKER (Dec. 16, 2019, 11:00 a.m.), https://www.americanbanker.com/news/out-of-the-shadows-use-of-alternative-data-in-lending-gains-ground.

[51] *See* ROBINSON & YU REPORT, *supra* note 13, at 5 fig. 1.

[52] Although Credit Kudos in the United Kingdom offers a credit score based on an opt-in structure, FICO and the national CRAs appear to be the only gatekeepers offering new scores based on consumer-permissioned data in the United States. *See*, for example, *Better Data. Better Decision*, CREDIT KUDOS, https://www.creditkudos.com/ (last visited Jan. 19, 2021).

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Experian and Finicity to offer an alternative score, called an UltraFico score.[53] In order for FICO to calculate the UltraFico score, a consumer must provide her login credentials for her checking, savings, or money market accounts.[54] Once FICO has accessed the customer accounts, it then analyzes the length of time the accounts have been open, recency and frequency of transactions, evidence of consistent cash on hand, and history of positive account balances, together with traditional credit data to calculate the alternative score.[55] Experian also offers Experian Boost, which requires a customer to give permission for links to her utility or telecom accounts to raise her FICO score.[56] Once Experian has access to a consumer's accounts, it may pull payment data as far back as twenty-four months.[57]

Some U.S. banks have also become providers of consumer-permissioned credit data by entering into agreements with account aggregators for direct access to customer accounts with the customer's permission.[58] For instance, despite the fact that JPMorgan Chase initially blocked financial account aggregators from accessing customer account information by other means,[59] the bank has now agreed to provide

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[53] *UltraFICO Score FAQ*, FINICITY 1, https://www.finicity.com/wp-content/uploads/UltraFICO-Simplified-FAQ.pdf (last visited Oct. 15, 2021). On the consumer-facing side, Finicity is a financial data aggregator that accesses its customers' financial accounts information to provide financial services. *Connect for a Better Experience*, FINICITY, https://www.finicity.com/connect/ (last visited Jan. 18, 2021).

[54] *Id*. Finicity provides the technical platform for consumers to permit the use of their account data. *Id*.

[55] *UltraFICO Score Fact Sheet*, FICO, https://www.fico.com/ultrafico/themes/custom/ultrafico/assets/UltraFICO_FactSheet_Cobranded.pdf (last visited Oct. 12, 2020).

[56] Alexandria White, *Here's How Experian Boost Can Help Raise Your Credit Score for Free*, CNBC (Aug. 6, 2021), https://www.cnbc.com/select/how-experian-boost-works/.

[57] Bob Musinski, *Is Experian Boost Worth It?*, U.S. NEWS (Sept. 6, 2019), https://creditcards.usnews.com/articles/is-experian-boost-worth-it.

[58] Rachel Green, *JPMorgan Chase is Working on Tools to Let Customers Control Which Third-Party Apps Can Access Their Data*, BUSINESS INSIDER (Jan. 17, 2020, 7:37 a.m.), https://www.businessinsider.com/jpmorgan-chase-to-create-dashboard-for-data-sharing-2020-1.

[59] Penny Crosman, *JPMorgan Chase Moves to Block Fintechs from Screen Scraping*, AM. BANKER (Jan. 2, 2020, 3:25 p.m.), https://www.americanbanker.com/news/jpmorgan-chase-moves-to-block-fintechs-from-screen-scraping. Similarly, PNC Bank blocked screen scrapers after the bank had been alerted that certain aggregators were circumventing security controls, and as a result, there was fraud occurring on customers' accounts. *Id*.

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fintech companies with access to bank accounts upon a customer's request.[60] After gaining access, account aggregators may collect and analyze account balances and transaction histories to provide credit reporting, cash flow underwriting, financial management, and savings services.[61]

2. Consumer Interactions

As a result of uncertainty caused by the coronavirus,[62] lenders are currently looking to augment their traditional underwriting with their own transactional data to avoid lending to applicants who are unemployed and to identify existing customers at a higher risk of defaulting.[63] For example, banks analyze account cash flows to spot a lag in deposit times, which might indicate a recent layoff.[64]

Newer fintech lenders also analyze data collected directly from consumers' interactions with their platforms. For example, lenders have considered data such as the timing of the application itself and location data (a loan application submitted from a high-crime area may be graded riskier than a loan from a low-crime area) to assess the riskiness of

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[60]*See* Nathan DiCamillo, *JPMorgan Chase Inks Fourth Data Aggregator Deal*, AM. BANKER (Oct. 22, 2018, 11:41 a.m.), https://www.americanbanker.com/payments/news/jpmorgan-chase-inks-fourth-data-aggregator-deal (reporting that JPMorgan entered its fourth data-exchange agreement with Plaid after prior agreements with Intuit, Finicity and Quovo). Through these agreements, JPMorgan Chase shares customer data directly through the bank's application programming interface (API). Crosman, *supra* note 59, at 1. Prior to entering into these agreements, data aggregators could only access account data by obtaining usernames and passwords of customers, logging in as the customer, and copying information into their databases. *Id.*

[61]LAUREN SAUNDERS & NAT'L CONSUMER LAW CTR., FINTECH AND CONSUMER PROTECTION: A SNAPSHOT 6 (2019), https://www.nclc.org/images/pdf/cons-protection/rpt-fintech-and-consumer-protection-a-snapshot-march2019.pdf. Broad data aggregators summarize information into profiles and sell aggregated information to companies that seek a target market, whereas individualized aggregation involves selling information about an individual. Kirsten Martin, *Data Aggregators, Consumer Data, and Responsibility Online: Who is Tracking Consumers Online and Should They Stop?*, 32 THE INFO. SOCIETY 51, 57 (2016).

[62]Andriotis, *supra* note 46.

[63]AnnaMaria Andriotis, *Coronavirus Tanked the Economy. Then Credit Scores Went Up*, WALL ST. J. (Oct. 18, 2020, 5:30 a.m.), https://www.wsj.com/articles/coronavirus-tanked-the-economy-then-credit-scores-went-up-11603013402. Finicity is also in talks with banks to provide this data from other lenders as well. *Id.*

[64]*Id.*

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loans.[65] Other lenders, such as PayPal, Square, and Amazon, access cash flow data from their transaction histories, and use this information to evaluate loans to small businesses that may have difficulty obtaining traditional financing.[66]

3. Covert Collection

Many alternative credit data sources are even less transparent to the consumer. To obtain access to nonpermissioned data (data without a consumer's explicit agreement), CRAs often turn to their own proprietary databases, third-party data aggregators, publicly available data, or a combination thereof. The sources of nonpermissioned data are unclear. For example, Experian advertises proprietary databases of alternative credit data, including ConsumerView, a database that stores data relating to household income, purchase history, socio-demographics, lifestyle, culture, and behavioral data[67] but provides no information as to how this data is acquired.

We know that aggregators often obtain the publicly available portion of nonpermissioned data from automated Internet searches by using techniques such as web scraping and crawling.[68] Web scraped data refers to data that has been harvested from public websites.[69] Companies such as Quandi, Savr, Thinknum, and Yipit specialize in programs that access

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[65] Jagtiana & Lemieux, *supra* note 15, at 1015.

[66] *Id*.

[67] Tailford v. Experian Info. Solutions, Inc., No. SACV 19-02191JVS(KESx), 2020 WL 2464797, at *2 (C.D. Cal May 12, 2020); *see also ConsumerView: Marketing Data That Connects Brands with Fans*, Experian, https://www.experian.com/marketing-services/targeting/data-driven-marketing/consumer-view-data (last visited Oct. 24, 2020). Experian also includes data from its Rent Bureau division, which collects rental payment data from property management firms and landlords, into its credit reports. *Build Credit History by Paying Your Rent on Time*, Experian, https://www.experian.com/rentbureau/rental-payment (last visited Oct. 14, 2020). Experian is also including this data in some of its newer credit scores. For example, Experian's Extended View Credit Score is based on credit data, rental information and public record data. *Extended View Score*, Experian, https://www.experian.com/assets/consumer-information/product-sheets/extended-view-score.pdf (last visited Oct. 13, 2020).

[68] Mikella Hurley & Julius Adebayo, *Credit Scoring in the Era of Big Data*, 18 Yale J. L. & Tech 148, 175 (2016).

[69] Zachary Gold & Mark Latonero, *Robots Welcome?: Ethical and Legal Considerations for Web Crawling and Scraping*, 13 Wash. J. L. Tech. & Arts 275, 275–76 (2018).

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targeted websites and collect available information on a periodic basis.[70] Data crawling is similar, except that it involves downloading pages from the web as opposed to extracting data from various sites.[71] Fintech lenders and other credit gatekeepers then obtain this data from aggregators for use in credit assessment.[72]

II. Growing Problems and Regulatory Gaps

With the evolution of individual data collection and credit scoring, concerns regarding abuses and inaccuracies arose and Congress responded to these concerns by enacting or amending legislation. Two major federal statutes apply to credit reports and scores: the Fair Credit Reporting Act and the Equal Credit Opportunity Act (ECOA).[73] A review of statutory provisions provides context to identify gaps in consumer credit protections and highlights new issues brought about by fintech firms' growing use of alternative data, and how these protection gaps relate to the consumer credit industry. The regulatory gaps allow credit gatekeepers to participate in the lucrative alternative credit industry in spite of various potentially negative effects on fair lending practices.

A. Fair Credit and Fair Lending Statutes

In response to widespread reports of abuses and congressional investigations into unfair consumer information collection practices, Congress enacted the Fair Credit Reporting Act in 1970.[74] The FCRA is the primary Act that regulates the business of credit reporting to promote accuracy, fairness, and the privacy of personal information.[75] To that end, the

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[70] Richard Johnson, *Alternative Data in Action: Web-Scraping*, Coalition Greenwich (Jan. 14, 2019), https://www.greenwich.com/blog/alternative-data-action-web-scraping.

[71] *Web Crawler*, ScienceDaily, https://www.sciencedaily.com/terms/web_crawler.htm (last visited Oct. 14, 2020).

[72] Jagtiana & Lemieux, *supra* note 15, at 1015.

[73] Equal Credit Opportunity Act, Pub. L. No. 93-495, §§ 501–503, 88 Stat. 1521 (1974) (current version at 15 U.S.C. § 1691 (2011)).

[74] 15 U.S.C. § 1681 (2018).

[75] *A Summary of Your Rights Under the Fair Credit Reporting Act*, FTC, https://www.consumer.ftc.gov/articles/pdf-0096-fair-credit-reporting-act.pdf (last visited Jan. 19, 2021).

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Act regulates CRAs,[76] users of consumer reports,[77] and furnishers of consumer information.[78]

The FCRA has been amended multiple times since 1970, most notably in 1996 and 2003.[79] The Consumer Credit Reporting Reform Act of 1996 (the 1996 Amendments) expanded the duties of CRAs under the FCRA, particularly with respect to consumer disputes.[80] The amendments enacted in 2003 provided consumers with the right to receive a copy of their credit report annually and added provisions to assist consumers combat identity theft.[81]

To protect consumer privacy, the FCRA limits the disclosure of consumer reports, which may only be distributed for certain permissible purposes; for example, to lenders making a loan decision or to employers considering a candidate for employment if such distribution

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[76]The FCRA defines a "consumer reporting agency" as "any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports." 15 U.S.C. § 1681a(f) (2018). For the purposes of this article, the terms consumer reporting agency and credit reporting agency will be used interchangeably, and "CRA" will be used to denote both terms.

[77]The FCRA defines "consumer report" as "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (a) credit or insurance to be used primarily for personal, family, or household purposes; (b) employment purposes; or (c) any other purpose authorized under [the act]." 15 U.S.C. § 1681a(d) (2018). For purposes of this article, the terms consumer report and credit report are used interchangeably.

[78]15 U.S.C. § 1681s-2 (2018).

[79]The FCRA was also amended in 2007 with the passage of the Credit and Debit Card Receipt Clarification Act, which required account numbers printed on receipts to be shorted to five digits to protect consumer privacy. Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. No. 110-241, 122 Stat. 1565 (2008).

[80]FTC, 40 Years of Experience with the Fair Credit Reporting Act 2 (2011), https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf [hereinafter FTC Staff Report].

[81]*Id*. at 3.

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for employment is accurately and clearly disclosed to the individual.[82] The FCRA also requires CRAs to use reasonable procedures to prevent unlawful disclosures of consumer information more broadly.[83] For example, the user must identify itself and the reason for seeking a credit report.[84] Consumer data protection, however, is not absolute. The 1996 Amendments expanded the ability to share consumer information among affiliated companies and allowed sharing of firsthand experience with the consumer, as well as non-transactional or nonexperience information among affiliates, so long as the consumer receives notice of the sharing and an opportunity to opt out.[85] Thus, the 1996 Amendments allow these affiliates to use such information for marketing purposes so long as the consumer has not opted out.[86] When Congress amended the FCRA again in 2003 through the Fair and Accurate Credit Transaction Act (FACT Act),[87] consumers were provided greater access to their own credit files, since CRAs were required to make credit reports available to consumers upon request once per year without charge and to make credit scores available to consumers for a reasonable fee.[88]

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[82]Aside from consumer reports issued for employment purposes, consumer consent is not a prerequisite for any permissible purpose. 15 U.S.C. §§ 1681b(b), 1681a(h) (2018); *see*, for example, Hinton v. Trans Union, LLC, 654 F. Supp. 2d 440, 449 (E.D. Va. 2009).

[83]15 U.S.C. § 1681e(b) (2018); *see* Thompson v. San Antonio Retail Merchants Ass'n, 682 F.2d 509, 513 (5th Cir. 1982) (noting that Section 1681e(b) imposes a duty of reasonable care on CRAs).

[84]15 U.S.C. § 1681e(a).

[85]*Id.* § 1681a(d)(2).

[86]*Fair Credit Reporting Act Amendments: Affiliate Sharing*, REED SMITH (Mar. 10, 2004), https://www.reedsmith.com/en/perspectives/2004/03/fair-credit-reporting-act-amendments-affiliate-sha.

[87]Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (codified as amended at 15 U.S.C. §§ 1681–1681x (2003)).

[88]*Id.* § 1681g. Importantly, the FACT Act does not require "a consumer reporting agency to disclose to a consumer any information concerning credit scores or any other risk scores or predictors relating to the consumer," except for four "key factors" involved in credit decisions. *Id.* §§ 1681g(a)(1)(B), 1681g(f). The FACT Act also added new exceptions to the opt-out notice requirements, including an exception that permits an affiliated company that has a preexisting business relationship with a consumer to use consumer information received in order to send marketing solicitations. *Id.* § 1681s-3(a). The FACT Act also heightened the duties of furnishers by prohibiting a data furnisher from reporting information that it "knows or has reasonable cause to believe" is inaccurate and by requiring a financial institution furnisher to notify customers that it is providing negative information about a customer. *Id.* § 1681s-2(a)(1). Note that this requirement is a heightened standard as compared to the "knows or consciously avoids knowing" the information is inaccurate standard from the previous version.

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In 1974, Congress enacted the Equal Credit Opportunity Act to ensure that "financial institutions and other firms engaged in the extension of credit make that credit equally available to all credit-worthy customers without regard to sex or marital status."[89] In 1976, Congress expanded the ECOA to prohibit credit discrimination based on race, color, national origin, age, receipt of public assistance income, or the exercise in good faith of the rights guaranteed.[90] The ECOA applies these nondiscriminatory duties to any person who regularly participates in credit decisions in the ordinary course of business.[91]

Regulations enforcing the ECOA apply to scoring as a method of credit analysis but do not certify or approve any particular methodology. Creditors may use subjective methods or more objective, statistically developed techniques, or a combination thereof.[92] Regardless of the method chosen, the creditor cannot consider the individual characteristics of age,[93] receipt of public assistance, likelihood of childrearing or childbearing, lack of telephone listings, certain sources of income, immigration status, marital status, race, color, religion, national origin, or sex of the applicant when evaluating their creditworthiness.[94] A creditor cannot, therefore, rely on a credit scoring formula that uses any of those factors as variables.[95] The regulations also require a creditor to notify or disclose to an applicant the specific reasons for an adverse action within thirty days of an application.[96] A statement

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[89]Equal Credit Opportunity Act, Pub. L. No. 93-495, §§ 501–503, 88 Stat. 1521 (1974) (current version at 15 U.S.C. § 1691 (2011)).

[90]Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, §§ 1–8, 90 Stat. 251 (1976) (current version at 15 U.S.C. § 1691 (2011)). The CFPB's Regulation B, found at 12 C.F.R. pt. 1002 (2011), implements ECOA.

[91]12 C.F.R. § 202.2(k) (2012).

[92]Regulation B prescribes the standards that a credit scoring system must meet to qualify as an "empirically derived, demonstrably and statistically sound, credit scoring system." *Id.* § 1002.2.

[93]Note, the ECOA does allow age to be considered "[i]n an empirically derived, demonstrably and statistically sound, credit scoring system" so long as the age of an elderly applicant is not assigned a negative factor or value. *Id.* § 1002.6(b).

[94]*Id.*

[95]*See* 12 C.F.R. § 1002.4(a) (2011) ("A creditor shall not discriminate against an applicant on a prohibited basis regarding any aspect of a credit transaction."); Hurley & Adebayo, *supra* note 68, at 190.

[96]12 C.F.R. § 1002.9(a) (2011).

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that only indicates that the applicant failed to achieve a minimum score is insufficient, rather the creditor must disclose the factors actually considered and scored by the creditor that fell below average.[97]

Other federal statutes that apply to credit reporting and decision making include the Gramm-Leach-Bliley Act (GLBA), which incorporated rules relating to consumer data privacy and security;[98] the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act of 2010 (Dodd-Frank), which established the Consumer Financial Protection Bureau (CFPB) and granted it the authority to regulate entities that provide consumer financial products or services;[99] and the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018 (Economic Growth Act).[100] Section 310 of the Economic Growth Act directed the Federal Housing Financing Agency to initiate a process by which alternative scoring models could be validated and approved for use by Fannie Mae and Freddie Mac in the purchase of residential mortgages,[101] with the expectation that the models would consider data on rent, utility, and cell phone payment, thereby increasing access to credit.[102]

B. More Data, More Problems

In spite of enacted laws and regulations that regulate the consumer credit industry, multiple gaps and inadequacies persist. These gaps will

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[97]*Id.* § 1002.9(b)(2).

[98]Gramm-Leach-Bliley Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified as amended in scattered sections of Titles 12 and 15 of the U.S.C.).

[99]Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of Titles 12 and 15 of the U.S.C.).

[100]Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018, Pub. L. No. 115-174, 132 Stat. 1296 (2018) (amending, among other Acts, Dodd-Frank § 1001-1100H). The CFPB has rulemaking and enforcement authority over all CRAs and supervisory authority over CRAs with at least $7 million in annual receipts. *CFPB to Supervise Credit Reporting*, CFPB (July 16, 2012), http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-to-superivse-credit-reporting/.

[101]Economic Growth Act § 310.

[102]Bradford Thaler, *Regulatory Relief Becomes Law*, NAT'L ASS'N OF FEDERALLY-INSURED CREDIT UNIONS (May 25, 2018), https://www.nafcu.org/compliance-blog/regulatory-relief-becomes-law. This process is discussed in greater detail in Part III.

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only increase with the growing use of alternative credit data, especially fringe alternative data.

1. Opacity of Credit Scoring and Algorithms

To some extent, based on arguments of convenience and efficiency, the credit scoring process has reduced the need for human judgment to evaluate consumer creditworthiness. Yet, these benefits have come at a price. Consumers' chief complaint about credit scoring is that no one knows exactly how their score is calculated.[103] Although an individual may be turned down for a loan, a lease, or a job because of this number, the formula used for its calculation is protected as intellectual property and is not even accessible to government regulators.[104] This secrecy is justified as means to prevent competitors from copying the protected formulas and individuals from manipulating their scores.[105]

Congress has done little to shine light into the black box of credit scoring. Although the FACT Act requires CRAs to disclose credit scores to individuals in exchange for a capped fee, it does not require a CRA to disclose any information concerning calculation of credit scores beyond disclosure of four "key factors" involved in credit decisions.[106] Further, Dodd-Frank expressly exempts the disclosure of scoring algorithms, the data-driven mathematically derived formulas used to predict risk or scores, or other predictors of creditworthiness.[107] FICO, the dominant provider of credit scores in the United States, at least provides the

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[103]*See* Citron & Pasquale, *supra* note 14, at 10–16 (describing criticisms of traditional scores, starting first with their opacity); Brenda Reddix-Smalls, *Credit Scoring and Trade Secrecy: An Algorithmic Quagmire or How the Lack of Transparency in Complex Financial Models Scuttled the Finance Market*, 12 U.C. DAVIS BUS. L. J. 87, 105 (2011). (discussing the informational imbalance between loan applicants and lenders created by the use of credit reporting and risk modeling).

[104]*See* Reddix-Smalls, *supra* note 103, at 91 ("As property, complex finance risk models often receive intellectual property proprietary protection. These proprietary protections may take the form of patents, copyrights, trade secrets, and sometimes trademarks.").

[105]Christopher P. Guzelian et al., *Credit Scores, Lending, and Psychosocial Disability*, 95 B.U. L. REV. 1807, 1815 (2015).

[106]15 U.S.C. §§ 1681g(a)(1)(B), 1681g(f)(C) (2015).

[107]Dodd-Frank § 1033(b) ("A covered person may not be required by this section to make available to the consumer any confidential commercial information, including an algorithm used to derive credit scores or other risk scores or predictors …").

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relative weight of certain variables used to calculate its credit scores.[108] Even with the disclosure of these variables, the impacts of any given action (such as paying down a principal balance) on a variable (such as amounts owed) remain a mystery. Without more precise information, an individual who has been denied credit does not have a clear plan for the steps they can take to raise their credit score.

With the advent of alternative data, concerns about the black-boxed nature of credit decisions have intensified exponentially.[109] While many new scoring tools are marketed to lenders to aid in their underwriting processes, the algorithms and datasets used therein often remain the intellectual property of third parties. Thus, lenders lack the access necessary to analyze the models and data used to ensure fair lending practices.[110] Further, with the use of artificial intelligence and machine learning in scoring algorithms, it is increasingly difficult for even the model designers to understand the black box—let alone consumers whose financial future rests upon the output.[111]

Due to the complexity of the data and algorithms, consumers may find it practically impossible to challenge alternative credit models. The proprietary nature of credit algorithms serves as a barrier to enforcement,[112] and consumers have no access to any alternative data inputs needed to verify the accuracy of their scores.[113] Further, even if disclosure of the inputs became mandatory, analyzing thousands of

[108]According to its website, FICO's scores are calculated by weighting payment history 35%, amounts owed 30%, length of credit history 15%, new credit 10%, and credit mix 10%. *What's in My FICO Scores?*, *supra* note 40.

[109]Kaveh Waddell, *How Algorithms Can Bring Down Minorities' Credit Scores*, The Atlantic (Dec. 1, 2016), https://www.theatlantic.com/technology/archive/2016/12/how-algorithms-can-bring-down-minorities-credit-scores/509333/ (noting that "the more complex and opaque these powerful algorithms get, the more ways there are for people to be disqualified from job searches and loan applications—and the harder it is to know why.").

[110]Ryan, *supra* note 50.

[111]*See* Siobhan Roberts, *The Yoda of Silicon Valley*, N.Y. Times (Dec. 17, 2018), https://www.nytimes.com/2018/12/17/science/donald-knuth-computers-algorithms-programming.html (q uoting Kevin Slavin as saying "We are now writing algorithms we cannot read. That makes this a unique moment in history, in that we are subject to ideas and actions and efforts by a set of physics that have human origins without human comprehension.").

[112]Reddix-Smalls, *supra* note 103, at 91.

[113]Hurley & Adebayo, *supra* note 68, at 189.

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potential data points is beyond the capabilities of the majority of consumers.[114]

2. Consumers' Lack of Control Over Personal Data

Americans neither consent to nor have the right to opt out of the traditional credit reporting and scoring system.[115] Upon birth, individuals become involuntary financial data providers. Unbeknownst to them, CRAs maintain credit files on children, which leaves minors vulnerable to identity theft even before they enter into their first transaction. According to one study, more than one million children were victims of identity fraud in 2017, and two-thirds of the victims were younger than eight.[116]

Once a credit file has been established, consumers have little control over the data that drives their credit scores. In comparison, data furnishers have a great deal of discretion to select data that they provide to the CRAs. Some furnishers report all obligations owed, while others only report when balances reach a certain threshold or when debts are written off.[117] Some data may not be reported at all.[118]

Credit files are also used in ways that are not entirely transparent to the consumer. CRAs profit not only from the involuntary yet well-known sale of credit history to lenders vetting credit applicants, but also from selling other information, such as the fact that an individual has applied for a mortgage, to competing lenders.[119] Enough use of these so-called

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[114] *Id*. at 189–90.

[115] In the wake of the Equifax hack that affected 145.5 million Americans, the credit reporting agencies again came under fire for their business model. Andriotis et al., *supra* note 2.

[116] Pascual & Marchini, *supra* note 2.

[117] Cong. Res. Serv., *supra* note 35, at 5.

[118] *See id*. (noting that furnishing data on tradelines is voluntary and that some furnishers report only tradeline data in certain circumstances). Credit card issuers are more likely to report tradeline information on consumer cards than on small business cards even when the cards are based on personal credit history of the business owners. *Id*. at 15.

[119] Kenneth R. Harney, *Your Mortgage Application May Trigger Competitors to Tempt You with Other Offers*, Wash. Post (Feb. 27, 2018), https://www.washingtonpost.com/realestate/your-mortgage-application-may-trigger-competitors-to-tempt-you-with-other-offers/2018/02/26/7760f9e8-1b22-11e8-ae5a-16e60e4605f3_story.htmlx.

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"trigger leads" in misleading sales campaigns have led some groups to call for a congressional ban on them altogether.[120]

While some new alternative credit scores are advertised as giving consumers more control,[121] consumers are insufficiently informed of the nature of the bargain and are often presented the so-called option when they are most vulnerable. The alternative credit score services are often marketed as free, with little downside.[122] Experian reports that the average customer increases her FICO score by thirteen points after linking her utility accounts, and it provides a feed of sample consumers' results.[123] For example, one customer provided Experian with access to two utility accounts and one telecom account for a single point increase.[124] Consumers may not realize that this single point or even thirteen additional points would most likely have no effect on the outcome of a credit application. Such results raise the question as to whether these products are designed to improve access to credit for the underbanked or whether they are simply a means for CRAs to gain additional access to valuable consumer data.[125]

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[120]*Id*.

[121]*UltraFico*, FICO, https://www.fico.com/ultrafico/ ("Your data. Your UltraFICO Score. You're in control.").

[122]*See*, for example, *Score Boost*, EXPERIAN, https://www.experian.com/consumer-products/score-boost.html (last visited Oct. 28, 2020) (advertising that "Experian Boost is completely free" and that consumers can raise "credit scores securely"). For a discussion of how conventional principles of contract law are inadequate in the context of personal data, given that consumers are not aware of the consequences of their transactions, *see* Kevin E. Davis & Florencia Marotta-Wurgler, *Contracting for Personal Data*, 94 N.Y.U. L. REV. 662, 669–74 (2019); *see also* Lauren Henry Scholz, *Big Data Is Not Big Oil: The Role of Analogy in the Law of New Technologies*, 86 TENN. L. REV. 863, 887–91 (2020) (rejecting the common data-oil analogy in favor of viewing data as personhood, which would endow the creator with unwaivable rights).

[123]*See*, for example, *Score Boost*, EXPERIAN, https://www.experian.com/consumer-products/score-boost.html (last visited Oct. 15, 2021); *see also* Davis & Marotta-Wurgler, *supra* note 122, at 669–74; Scholz, *supra* note 122, at 887–91.

[124]*Score Boost*, *supra* note 122.

[125]Penny Crosman, *New UltraFICO Score Stokes Concerns About Data Privacy*, AM. BANKER (Oct. 23, 2018, 1:51 p.m.), https://www.americanbanker.com/news/new-ultrafico-score-stokes-concerns-about-data-privacy (citing privacy concerns with credit bureaus having unfettered access to bank account data). As noted by Terri Friedline in her new book, fintech tools have been developed for surveillance of "Black and Brown communities by requiring individuals to sacrifice their privacy in order to participate" who already experience targeted surveillance in law enforcement, education, public welfare, and housing. FRIEDLINE, *supra* note 7, at 146.

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Whether the choice to opt in is truly voluntary is also questionable. An applicant who has been turned down for a loan might be given the option to switch to an UltraFICO score to improve her chances of approval.[126] If the loan is necessary for her economic survival, however, then providing access to bank accounts appears less voluntarily and more compulsory in nature. Again, the UltraFICO score only offers the *potential* of a score increase. In fact, only ten percent of consumers' scores increase by twenty points or more.[127] Even in the best-case scenarios, the applicant would be unlikely to move from a "bad" to a "fair" score or from a "fair" to a "good" score.[128] In other words, financially vulnerable individuals who are most likely to "opt in" to exposing their account data are statistically unlikely to benefit from this loss of privacy.

Meanwhile, other means of collecting alternative credit data are entirely involuntary and not disclosed to consumers at all. Such collection can occur when lenders obtain alternative data from aggregators, who scrape and crawl the web for data without the permission of consumers,[129] or from the applicant's interaction with the application itself.[130] While consumers have a right to request their credit report under the FCRA,[131] consumers do not have a statutory right to know what information data aggregators have compiled about them or even which data

[126]Crosman, *supra* note 125 (reporting that some lenders plan to use the UltraFICO as a "second chance" score for applicants who have been declined for credit).

[127]Bev O'Shea, *New UltraFICO Score Could Boost Credit Access for Consumers. Here's How it Will Work*, USA Today (Oct. 27, 2018, 7:00 a.m.), https://www.usatoday.com/story/money/personalfinance/2018/10/27/ultrafico-score-boost-credit-access-fico-questions/38243737/.

[128]Liz Weston, *Is Better Credit Worth Exposing Your Bank Data?*, AP News (May 6, 2019), https://apnews.com/article/41404bfa14a240f9ae23d3599edfeaec.

[129]*See supra* notes 67–71 and accompanying text.

[130]For example, LendingClub does not disclose to applicants that it factors in applicants' interactions with its website to determine creditworthiness. *See* LendingClub, https://www.lendingclub.com/apply/personal/identity/loantype?loanAmount=20000&loanPurpose=home_improvement&creditScore=EXCELLENT. Note, the URL includes "creditScore=excellent" even though the authors did not indicate credit score range when testing the application.

[131]15 U.S.C. § 1681g. Although the FACT Act did improve the consumer dispute process, CRAs have little economic incentive to conduct proper investigations. Chi Chi Wu et al., Automated Injustice: How a Mechanized Dispute System Frustrates Consumers Seeking to Fix Errors in Their Credit Reports 30 (2009), https://www.nclc.org/images/pdf/pr-reports/report-automated_injustice.pdf. *Id*. at 13.

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brokers hold such information.[132] Even with permissioned data, it is unclear whether a consumer's opt-in allows for ongoing use by lenders or CRAs in ways that the consumer may not understand or expect.[133]

With this lack of disclosure comes the inability to correct errors in alternative data, and as with traditional credit data, errors abound. One study found that assessments in income and education levels maintained by several big data companies were "riddled with inaccuracies or included little or incomplete information."[134] Even though these inaccuracies could lead to loan rejections or higher interest rates, consumers do not have a process by which to challenge errors.

3. Imbedded Biases in Credit Scoring Models

In the not-so-distant past, lenders and the U.S. government explicitly used race and national origin as factors to assess creditworthiness.[135] These policies ended in the 1970s, yet less explicit forms of discriminatory lending have continued, including the practices of directing white borrowers to mainstream financing and of targeting minority borrowers for high-interest, subprime loans.[136] Because the variables used to calculate credit scores still reflect the effects of such practices and historic policies, credit scoring contributes to the cycle of restricted access that dramatically impacts

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[132] *See* U.S. Gov't Accountability Off., Information Resellers: Consumer Privacy Framework Needs to Reflect Changes in Technology and the Marketplace 16 (Sept. 2013) [hereafter GAO Information Resellers Report].

[133] *See Banking on Your Data: The Role of Big Data in Financial Services: Hearing on Fin. Tech.*, 116th Cong. 4 (2019), https://www.nclc.org/images/pdf/cons-protection/testimony-lauren-saunders-data-aggregator-nov2019.pdf (testimony of Lauren Saunders, Assoc. Dir., Nat'l Consumer Law Ctr.) (stating that "with some services there are questions as to whether the consumer's opt in will allow ongoing use by any lender that accesses the service—or by the credit bureau more broadly—potentially in ways that the consumer does not expect or understand").

[134] Persis Yu et al., Big Data: A Big Disappointment for Scoring Consumer Creditworthiness 4 (2014).

[135] *See* Lisa Rice & Deidre Swesnik, *Discriminatory Effects of Credit Scoring on Communities of Color*, 46 Suffolk U. L. Rev. 935, 940–43 (2013) (describing the policies of the Home Owners Loan Corporation, Federal Housing Authority, and Veterans Administration that were explicitly discriminatory).

[136] *Id*. at 936, 943.

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communities of color.[137] For example, a close look at the payment history variable demonstrates the potential for discriminatory outcomes.[138] On its face, payment history as a variable is neutral with respect to race. Access to the means necessary to build a strong credit history, however, is not race neutral. The historic practice of redlining by conventional lenders,[139] combined with the fact that predatory lenders are more likely to target minorities,[140] make it more difficult for minorities to build a strong history of repayment.[141]

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[137] *Id*. at 943. Not only are African American and Hispanic individuals less likely to have credit scores, scored individuals in those groups on average have lower scores than Caucasian or Asian individuals. BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO THE CONGRESS ON CREDIT SCORING AND ITS EFFECTS ON THE AVAILABILITY AND AFFORDABILITY OF CREDIT, S-4 (2007). The study also concluded that "residing in low-income or predominantly minority census tracts" is a predictor of low credit scores. *Id*. The score differentials have real financial implications. An examination of 2015 mortgage-market data indicated that 27.4% of African American and 19.2% of Hispanic applicants were denied mortgages, compared to 11% of Caucasian and Asian applicants. Drew Desilver & Kristen Bialik, *Blacks and Hispanics Face Extra Challenges in Getting Home Loans*, PEW RSCH. CTR. (Jan. 10, 2017), https://www.pewresearch.org/fact-tank/2017/01/10/blacks-and-hispanics-face-extra-challenges-in-getting-home-loans/. The same study showed that among the African Americans and Hispanic applicants that were approved for loans, they were more likely to pay higher mortgage rates. *Id. See also* Ashlyn Aiko Nelson, *Credit Scores, Race, and Residential Sorting*, 29 J. POLICY ANALYSIS & MGMT. 39 (2010) (concluding that credit scores profoundly impact home purchasing power and thus the ability to access higher-quality public education).

[138] While the exact inputs and models used to calculate a credit score are proprietary, FICO has disclosed that its scoring formula weights payment history 35%. *See What's in My FICO Scores?*, *supra* note 40.

[139] "Redlining" refers to banks' practice of avoiding making loans in low-income neighborhoods. Willy E. Rice, *Race, Gender, "Redlining," and the Discriminatory Access to Loans, Credit, and Insurance: An Historical and Empirical Analysis of Consumers Who Sued Lenders and Insurers in Federal and State Courts, 1950–1995*, 33 SAN DIEGO L. REV. 583, 584–85 (1996).

[140] *See* Cassandra Jones Havard, *"On the Take": The Black Box of Credit Scoring and Mortgage Discrimination*, 20 B.U. PUB. INT. L.J. 241, 259 (2011).

[141] Professor Talia Gillis would call this variable a "biased world" input. *See*, for example, Talia Gillis, *The Input Fallacy,* MINN. L. REV. (forthcoming 2022) (discussing biased inputs in credit decisioning algorithms). Gillis groups credit variables into what she calls "biased world" inputs (those variables that rely on borrower characteristics that are a product of pre-existing disadvantage) and biased measurement inputs (those variables that are biased because of the way they define and estimate a characteristic). *Id*. Further, empirical evidence suggests that bias extends to sexual orientation as well. An Iowa State University study published in 2019 found that same-sex couples were 73% more likely to be denied a mortgage than heterosexual couples with comparable financial credentials. Hua Sun & Lei Gao, *Lending Practices to Same-Sex Borrowers*, 116 PROC. NAT'L ACAD. SCI. U.S. 9293, 9294 (2019); *see also* Rice & Swesnik, *supra* note 135, at 952–57 (describing how each of the factors used in traditional credit scoring leads to unintended discriminatory outcomes for people of color).

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Bias can be hidden not only in variables themselves, but also in how the individual variables are measured.[142] Take the "credit mix" variable, for example.[143] If tradelines from large financial institutions are treated more favorably than tradelines with smaller or local lenders, then the outcome will benefit those groups with better access to the larger institutions. A recent study found that forty-one traditional financial institutions exist for every 100,000 people in majority-white counties, as compared to twenty-seven per 100,000 in nonwhite neighborhoods.[144] Thus, a credit score that weighs mainstream financing more favorably than alternative financing will likely have a disparate impact on minorities.[145]

When lenders use these variables that reflect pre-existing disadvantages, the disadvantages continue to compound, as lenders use the inputs to set lending terms or even deny credit altogether.[146] Because credit provides a path to building wealth, the use of these variables continue to exacerbate wealth gaps in the United States.[147] As advocates and scholars have drawn attention to the inequities in recent years,[148] efforts have been made within

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[142]Gillis, *supra* note 141.

[143]Recall that "credit mix" is weighted 10% by FICO. *What's in My FICO Scores?*, *supra* note 40.

[144]Nick Noel et al., The Economic Impact of Closing the Racial Wealth Gap, 18 ex.8 (2019). The study also found that banks in majority black neighborhoods require higher account balances, which could discourage the use of those institutions in those areas. *Id*.

[145]Cathy O'Neil, *The Ethical Data Scientist*, Slate (Feb. 4, 2016, 8:30 a.m.), https://slate.com/technology/2016/02/how-to-bring-better-ethics-to-data-science.html (stating that using variables highly correlated to race is tantamount to using race as a variable).

[146]Gillis, *supra* note 141; *see also* Havard, *supra* note 140, at 247 (arguing that unchecked credit scoring is an intrinsic, established form of discrimination very similar to redlining).

[147]The McKinsey & Co. study reported that the racial wealth gap between black and white families grew from about $100,000 in 1992 to $154,000 in 2016. Noel et al., *supra* note 144, at 5.

[148]*See*, for example, Mehrsa Baradaran, How the Other Half Banks: Exclusion, Exploitation, and the Threat to Democracy 9–10 (2015) (describing how lack of access to financial services "makes it even more difficult for [the poor] to escape poverty"). Advocates and scholars have also turned their attention to proposing structural changes in the industry that could potentially address these inequities. *See*, for example, Mehrsa Baradaran, *It's Time for Postal Banking*, 127 Harv. L. Rev. F. 165, 165 (2014) (proposing that the United States Postal Service provide financial services to unbanked and underbanked Americans); John Crawford et al., *FedAccounts: Digital Dollars*, 89 Geo. Wash. L. Rev. 113, 113 (2021) (proposing allowing any American to have a deposit account with a Federal Reserve bank); Lindsay Sain Jones, *Aligning National Bank Priorities with the Public Interest: National Benefit Banks and a New Stakeholder Approach*, 58 Am. Bus. L. J. 5 (2021) (proposing a Federal Act that would enable national banks to consider nonshareholder interests and to form as benefit banks); Sarah Jones, *Why Public Banks Are Suddenly Popular*, The New Republic (Aug. 10, 2018), https://newrepublic.com/article/150594/public-banks-suddenly-popular (reporting that the concept of government-owned banks is gaining traction among politicians).

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the industry to make financial services more inclusive.[149] Financial inclusion has often been tied to access to services, and there is a long-standing recognition of the many Americans who continue to be "unbanked," documented by research literature that critiques this seemingly intractable problem.[150]

Being unbanked relates to being unscored, as persons who are unbanked turn to "fringe" lenders who charge higher rates under more onerous terms.[151] The connection continues: "[b]ecause fringe banks do not report loans to credit bureaus, utilizing these services also hinders an individual's ability to establish his or her own creditworthiness."[152] Mobile banking has had an ameliorative effect and is linked to decreases in the unbanked population in the United States,[153] but problems persist. Just having access to a banking account does not help individuals move out of poverty or "generate more income," the major problem.[154] Albeit not a panacea for solving

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[149]*See*, for example, CORPORATE SOCIAL RESPONSIBILITY 2019, TRUIST 17, 44 (2019), https://www.suntrust.com/content/dam/truist/us/en/documents/truist-corporate-social-responsibility-report.pdf (reporting on the bank's renewed focus on financial inclusion, including loans to low- and moderate-income borrowers and small businesses).

[150]*See* Michael A. Stegman, *Banking the Unbanked: Untapped Market Opportunities for North Carolina's Financial Institutions*, 5 N.C. BANKING INST. 23 (2001); Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REG. 121 (2004); James Marvin Pérez, *Blacklisted: The Unwarranted Divestment of Access to Bank Accounts*, 80 N.Y.U. L. REV. 1586 (2005); Cassandra J. Havard, *Doin' Banks*, 5 U. PA. J. L. & PUB. AFFAIRS 61 (2020). Postal banking (*see* Baradaran, *supra* note 148) and new products, such as Facebook's Libra payments, have been proposed as solutions for the unbanked. *See* Lizzie R. Hobbs, *Facebook's Libra: The Social Media Giant's Pursuit of Global Financial Inclusion*, 24 N.C. BANKING INST. 331 (2020).

[151]*See* Catherine Martin Christopher, *Mobile Banking: The Answer for the Unbanked in America*?, 65 CATH. U. L. REV. 221, 229 (2015).

[152]*Id*.

[153]*See* John Hielscher, *The Money Minders: New Technologies Attract Once-Unbanked Florida Customers*, HERALD-TRIBUNE (Oct. 26, 2020, 6:39 a.m.), https://www.heraldtribune.com/story/business/2020/10/26/mobile-banking-gets-more-popular-among-former-unbanked-floridians/3711261001/; *see also* Bob Legters, *What Banking for the Unbanked Means for You*, FORBES (July 10, 2020, 8:00 a.m.), https://www.forbes.com/sites/boblegters/2020/07/10/what-banking-for-the-unbanked-means-for-you/?sh=16d8eb657325 (reporting on difficulties with reaching unbanked populations for aid and highlighting the problems presented when individuals use high-cost financial substitutes).

[154]*See* Yaya Fanusie, *Stop Saying You Want to Bank the Unbanked*, FORBES (Jan. 1, 2021, 6:12 p.m.), https://www.forbes.com/sites/yayafanusie/2021/01/01/stop-saying-you-want-to-bank-the-unbanked/?sh=5fdf48f9456a. Yet improvements have been made, for example no-fee and reduced-fee checking accounts. *See*, for example, *Better Online Banking*, CHIME, https://www.chime.com/online-banking/ (last visited Mar. 18, 2021) (describing Chime's account features, which include early access to paychecks, no minimum deposit requirements, and no overdraft fees); *Branch App*, BRANCH, https://www.branchapp.com/ (last visited Mar. 18, 2021) (describing the bank's account features, which include early access to paychecks and fee-free checking).

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problems of poverty and financial inclusion, a revamped credit scoring system could decrease the suffocating burdens.

While the use of alternative credit data and scoring has the potential to reduce discrimination in lending and provide for more accurate modeling of creditworthiness,[155] its use also presents the potential for abuse of financially vulnerable consumers in the absence of meaningful regulation.[156] Rather than opening up credit opportunities for disadvantaged groups as expected,[157] alternative credit scoring could serve to further discriminatory lending practices.[158] The risk is that the alternative models could be combined with facially neutral alternative data that highly correlate with immutable characteristics.[159] For example, educational background, geography, work history, income, prospective income growth, and wealth are facially race-neutral, but each factor is highly cor-

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[155]There is evidence to suggest that algorithms can reduce face-to-face discrimination in markets prone to implicit and explicit bias. Robert Bartlett et al., Consumer-Lending Discrimination in the FinTech Era 2 (Nat'l Bureau of Econ. Research, Working Paper No. 25943, June 2019), https://www.nber.org/system/files/working_papers/w25943/w25943.pdf.

[156]A Berkley study found that Latino and African American borrowers were charged 7.9 and 3.6 basis points more for original and refinance mortgages, respectively, than white applicants who had the same FICO score and loan-to-value ratio—regardless of whether a loan officer or a software-based underwriter set the rates. TARUNIMA PRABHAKAR & U.C. BERKELEY CTR. FOR LONG-TERM CYBERSECURITY, A NEW ERA FOR CREDIT SCORING: FINANCIAL INCLUSION, DATA SECURITY, AND PRIVACY PROTECTION IN THE AGE OF DIGITAL LENDING 15 (2020), https://cltc.berkeley.edu/wp-content/uploads/2020/06/A_New_Era_for_Credit_Scoring.pdf. (concluding that digital mortgages resulted in higher prices to equally qualified borrowers of color in the same manner as traditional underwriting does). The additional points result in $765 million in aggregate extra interest per year. *Id*. at 1. On a positive note, the study also concluded that algorithmic lending does not appear to discriminate when used for approving loans. *Id*. at 2.

[157]*See*, for example, ETHAN LOUFIELD ET AL., ACCELERATING FINANCIAL INCLUSION WITH NEW DATA (2018), https://content.centerforfinancialinclusion.org/wp-content/uploads/sites/2/2018/08/AcceleratingFINewData_Final_2018.06.26.pdf.

[158]*Data Aggregation, Credit Scoring, and Privacy*, HARV. CIVIL LIBERTIES L. REV. (Feb. 13, 2012), https://harvardcrcl.org/data-aggregation-credit-scoring-and-privacy/; *see also* Colin Wilhelm, *Big Data* vs. *the Credit Gap*, POLITICO (Feb. 7, 2018, 5:02 a.m.), https://www.politico.com/agenda/story/2018/02/07/big-data-credit-gap-000630/ (reporting advocates' concerns that the use of alternative data can result in racial discrimination).

[159]Hurley & Adebayo, *supra* note 68, at 182.

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related with an applicant's race.[160] Meanwhile, lenders can stand behind these increasingly complex algorithms and claim that all decisions are neutral.[161] As one commentator summarized:

> We know that credit reports and scores can reinforce existing inequality. The question is whether we treat new sources of data, *i.e.*, alternative data, in the same way or whether we develop algorithms and policies that allow the American dream to flourish once again … We have a chance with new data sources and models to do better. The question is whether we will do so or whether we will contribute to the gaping inequality in our society.[162]

In addition, the use of alternative data has made it easier for high-interest lenders to target vulnerable populations for high-interest loans, thus perpetuating the discriminatory cycle.[163] While CRAs currently frame alternative scores in terms of their potential benefits to the unbanked and underbanked,[164] a review of marketing materials reveals less altruistic motives.[165] For example, Experian markets its ChoiceScore as a means for marketers to "identify and more effectively market to

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[160]For example, a recent study found that the net worth of a typical white family is nearly ten times greater than that of a black family. Kriston McIntosh et al., *Examining the Black-White Wealth Gap*, BROOKINGS INST. (Feb. 27, 2020), https://memphis.uli.org/wp-content/uploads/sites/49/2020/07/Examining-the-Black-white-wealth-gap.pdf.

[161]Hurley & Adebayo, *supra* note 68, at 182.

[162]*Alternative Data Hearing*, *supra* note 12.

[163]Coulter Jones et al., *How Payday Lenders Target Consumers Hurt by Coronavirus*, WALL ST. J. (June 3, 2020, 8:23 a.m.), https://www.wsj.com/articles/how-payday-lenders-target-consumers-hurt-by-coronavirus-11591176601 (reporting that hundreds of lenders have been marketing loans that carry 200% to 500% annual interest rates to consumers who search online for financial help).

[164]*See*, for example, *UltraFico Score*, FICO, https://www.fico.com/en/products/ultrafico-score (last visited Nov. 19, 2020) (stating that the UltraFico score offers a "New, More Inclusive Approach").

[165]A 2013 Senate investigation concluded that data brokers sell products that help marketers identify financially vulnerable customers. U.S. SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION, A REVIEW OF THE DATA BROKER INDUSTRY: COLLECTION, USE, AND SALE OF CONSUMER DATA FOR MARKETING PURPOSES ii (2013), https://www.commerce.senate.gov/services/files/0d2b3642-6221-4888-a631-08f2f255b577 [hereinafter SENATE REPORT]. The Senate Committee found that data brokers sell a number of products focused on consumers' financial vulnerability, carrying titles such as "Rural and Barely Making It," "Ethnic Second-City Strugglers," "Retiring on Empty: Singles," "Tough Start: Young Single Parents," and "Credit Crunched: City Families." *Id*.

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underbanked consumers using an array of noncredit data."[166] According to the company's marketing materials, "[e]ach year, underbanked consumers alone spend nearly $11 billion on nontraditional financial transactions like payday loans and check-cashing services."[167] Experian suggests that the product could be used to "market to underbanked consumers using an array of noncredit data, including consumer demographic, behavioral and geo-demographic information" and "identify underbanked and emerging consumers likely to be the most responsive to targeted campaigns, such as invitation-to-apply [for] credit."[168] In other words, the product is ideal for identifying financially vulnerable customers to offer them high-interest rate, short-term loans.[169]

A recent action against Facebook by the Department of Housing and Urban Development (HUD) highlights the discriminatory impact of these targeted marketing practices.[170] Unbeknownst to users, Facebook collected data from actions on and off its platform to classify users based on protected characteristics.[171] Facebook then invited advertisers to target *and exclude* housing-related ads to users based on these protected traits.[172] Such tactics inevitably lead to more consumers of color being

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[166]Experian, Experian Audience Lookbook 11 (2020), https://www.experian.com/content/dam/marketing/na/assets/ems/marketing-services/documents/product-sheets/audience-lookbook.pdf [hereinafter Experian Audience Lookbook].

[167]*Id*. An earlier iteration of the marketing materials described these consumers as "new legal immigrants, recent graduates, widows, those with a generation bias against the use of credit, followers of religions that historically have discouraged credit," and "consumers with transitory lifestyles, such as military personnel." Senate Report, *supra* note 165, at 25.

[168]Experian Audience Lookbook, *supra* note 166, at 11.

[169]Scholars Keeanga-Yamahtta Taylor, Louise Seamster and Raphaël Charron-Chénier refer to such practices as predatory inclusion and have analyzed them in the areas of student loans, payday lending and housing. *See generally* Louise Seamster & Raphaël Charron-Chénier, *Predatory Inclusion and Education Debt: Rethinking the Racial Wealth Gap*, 4 Soc. Currents 199 (2017); Raphaël Charron-Chénier, *Predatory Inclusion in Consumer Credit: Explaining Black and White Disparities in Payday Loan Use*, 35 Soc. F. 370 (2020); Keeanga-Yamahtta Taylor, *Predatory Inclusion*, 35 n+1 93 (2019).

[170]Charge of Discrimination, U.S. Dep't of Hous. & Urban Dev. v. Facebook, Inc., FHEO No. 01-18-0323-8 (Mar. 28, 2019), https://www.hud.gov/sites/dfiles/Main/documents/HUD_v_Facebook.pdf.

[171]*Id*. at 5.

[172]*Id*. at 6.

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directed to subprime mortgage and credit offers, even though they could qualify for more competitive rates.[173]

Such practices raise fair lending questions under the ECOA.[174] The ECOA applies to creditors and prohibits discrimination in "credit transactions,"[175] defined as "every aspect of an applicant's dealings with a creditor regarding an application for credit or an existing extension of credit."[176] Because the use of scoring tools to determine to whom advertisements for subprime loans should be sent does not involve an application or an extension for credit, the ECOA would not regulate credit-scoring fueled advertising used to target minority consumers for high-interest, short-term loans.[177]

More troublingly, CRAs and others openly market alternative data as ECOA-compliant by claiming that the data is "unlikely to fall into the

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[173]*License to Bank: Examining the Legal Framework Governing Who Can Lend and Process Payments in the Fintech Age*, 116th Cong. 8 (2020), https://financialservices.house.gov/uploadedfiles/hhrg-116-ba00-wstate-carrillor-20200929.pdf (testimony of Raúl Carillo, Policy Counsel, Americans for Financial Reform Education Fund).

[174]It should be noted that the ECOA is enforced through government action and private litigation by proving discrimination through "disparate treatment" or "disparate impact." CFPB, CFPB Consumer Laws and Regulations: Equal Credit Opportunity Act (ECOA) 1 (2013), https://files.consumerfinance.gov/f/201306_cfpb_laws-and-regulations_ecoa-combined-june-2013.pdf. For evidentiary reasons, it is very difficult to prevail under either theory. *See* Winnie F. Taylor, *Proving Racial Discrimination and Monitoring Fair Lending Compliance: The Missing Data Problem in Nonmortgage Credit*, 31 Rev. Banking & Fin. L. 199, 206 (2011–2012) (stating that "'smoking gun' evidence of lending discrimination is rare since lending discrimination is likely to be subtle, sophisticated and difficult to prove, especially given the use of computerized credit scoring systems to evaluate applicants"). Further, even if a plaintiff establishes a prima facie case, the defendant will be liable only if the plaintiff can then prove that an alternative policy could serve the business purpose with a less discriminatory effect. Winnie F. Taylor, *Eliminating Racial Discrimination in the Subprime Mortgage Market: Proposals for Fair Lending Reform*, 18 J. L. & Pol'y 263, 273 n.38 (2009–2010).

[175]12 C.F.R. § 202.2(m) (2012).

[176]*Id*.

[177]Hurley & Adebayo, *supra* note 68, at 192; *see also* Edith Ramirez, Chairwoman, FTC, Protecting Privacy in the Era of Big Data, Remarks Before the International Conference on Big Data from a Privacy Perspective 10 (June 10, 2015), *in* https://www.ftc.gov/system/files/documents/public_statements/671661/150610era_bigdata.pdf (stating that "although ECOA would prohibit racial distinctions in terms of access to credit, it may not prohibit those distinctions in the types of advertisements served. Thus, a minority consumer may only see ads for subprime products and may never know about the availability of better credit offers.").

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categories corresponding to prohibited basis by either ECOA or FHA."[178] Such claims ignore concerns that the various factors considered by automated credit scoring may appear objective but actually reflect systemic biases.[179] For example, the CFPB issued a no-action letter to Upstart Network, Inc., a company that uses alternative data to make credit underwriting and pricing decisions[180] despite the potential for discriminatory impact. The 2017 "No-Action Letter" indicated that the agency had no "present intention to recommend initiation of an enforcement or supervisory action against Upstart with regard to application of the Equal Credit Opportunity Act."[181] Though the totality of data collected by Upstart reported largely positive results to the CFPB,[182] a recent study found that Upstart is charging higher interest rates on

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[178] *See* EXPERIAN AUDIENCE LOOKBOOK, *supra* note 166, at 7 ("FLA friendly is becoming a popular request. FLA friendly is a reference that indicates data fields that Experian has made available that are unlikely to fall into the categories corresponding to prohibited basis by either ECOA or FHA. With Experian's FLA-friendly audience data, you can reach your best customers efficiently, with messages that resonate and feel confident knowing that the data was built with regulatory compliance in mind.").

[179] Hurley & Adebayo, *supra* note 68, at 149.

[180] Upstart's decision criteria include an analysis of data from applicants' social media posts and interactions with the application, including how quickly a user scrolls through the lender's website. Elizabeth Dwoskin, *"Big Data" Doesn't Yield Better Loans*, WALL ST. J., at C3 (Mar. 17, 2014, 11:19 p.m.), https://www.wsj.com/articles/SB10001424052702304732804579425631517880424.

[181] Letter from Christopher M. D'Angelo, Assoc. Dir. for Supervision, Enforcement & Fair Lending, Consumer Fin. Prot. Bureau, to Thomas P. Brown, Advisor for Upstart (Sep. 14, 2017), https://files.consumerfinance.gov/f/documents/201709_cfpb_upstart-no-action-letter.pdf [hereinafter Upstart No Action Letter]. The terms of the No-Action letter required Upstart to "share certain information with the CFPB regarding the loan applications it receives, how it decides which loans to approve, and how it will mitigate risk to consumers, as well as information on how its model expands access to credit for traditionally underserved populations." Press Release, CFPB, CFPB Announces First No-Action Letter to Upstart Network (Sept. 14, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-announces-first-no-action-letter-upstart-network/.

[182] Studies of Upstart's model found that "the tested model approves 27% more applicants than the traditional model, and yields 16% lower average APRs for approved loans[,]" and that this expansion in access to reasonably priced credit was reflected "across all tested race, ethnicity, and sex segments." Patrice Alexander Ficklin & Paul Watkins, *An Update on Credit Access and the Bureau's First No-Action Letter*, CFPB (Aug. 6, 2019), https://www.consumerfinance.gov/about-us/blog/update-credit-access-and-no-action-letter/.

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student loans to graduates of historically black or predominately Hispanic colleges.[183]

4. Intrusion Upon Privacy

Over recent years, consumer surveillance has grown to a multi-billion-dollar industry.[184] Some consumer advocates are concerned that the combination of traditional and alternative data creates a complete digital profile of an individual that extends far beyond what is necessary or even relevant to determine creditworthiness.[185] The resulting dossiers not only include credit scores, but also thousands of details about individuals obtained by scouring web searches, social networks, purchase histories, and public records.[186] In response to a Senate inquiry, Equifax reported that it maintains approximately 75,000 individual data points, including information as specific as whether a consumer purchased a particular soft drink or shampoo in the last six months, used laxatives or yeast infection products, visited an obstetrician-gynecologist within the last year, and the number of miles traveled in the last four weeks and whiskey drinks consumed in the past thirty days.[187]

Furthermore, consumers have no say in how their data is protected, yet they suffer a loss of privacy when their data is compromised. In September 2017, Equifax announced that a data breach exposed the

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[183]Chris Arnold, *Graduates of Historically Black Colleges May Be Paying More for Loans: Watchdog Group*, NPR (Feb. 5, 2020, 5:09 a.m.), https://www.npr.org/2020/02/05/802904167/watchdog-group-minority-college-graduates-may-pay-higher-interest-rates.

[184]Emily Steel, *Companies Scramble for Consumer Data*, Fin. Times (June 12, 2013), https://www.ft.com/content/f0b6edc0-d342-11e2-b3ff-00144feab7de.

[185]Senate Report, *supra* note 165, at 5.

[186]Steel, *supra* note 184.

[187]Senate Report, *supra* note 165, at 14. Data brokers more broadly are also well known for amassing large amounts of personal data. Steel, *supra* note 184. The *Financial Times* reports that LeadsPleads.com will sell the name and addresses of people suffering from cancer, diabetes, and clinical depression for $0.26 per person or $0.14 if purchased in bulk, and that ALC Data sells lists of individuals with certain ailments sorted by credit score. *Id*. It should be noted that the data broker industry operates under some self-regulated guidelines, which bar the collection of information about children and specific health and financial data. *Id*. Under the guidelines, the tracking and selling of information derived from medical records and prescriptions are allowed if patients' names and other identifying data have been deleted. *Id*. LeadsPleads claims, though, that the patient-specific ailment information has instead been provided by the patients themselves. *Id*.

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personal information of 147 million people,[188] including social security numbers, birth dates, addresses, and drivers' license numbers.[189] Equifax was faulted for security and response lapses that left millions of consumers more vulnerable to identity theft.[190]

While a security breach of traditional credit data results in a unwelcome dissemination of financial data, a breach of alternative credit data could result in the leak of information that may threaten individuals' physical safety, such as location histories and phone contacts.[191] Data aggregators' large collections of personal data already present targets for hackers, and the aggregators' business depends on providing much of that information to third parties with less extensive security protocols.[192] Consumers have no way of knowing whether the data aggregator or the partner fintech user has the appropriate security controls.[193] Further, even when consumers are denied credit after opting in to an alternative credit score, their personal data may continue to be stored on the digital platform long after consent is given.[194] For example, consumers who use Upstart, a fintech lender, must agree that all of

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[188]*See Equifax Data Breach Settlement*, FTC (Jan. 2020), https://www.ftc.gov/enforcement/cases-proceedings/refunds/equifax-data-breach-settlement#FAQ7 (announcing Equifax's global settlement with the Federal Trade Commission, the CFPB, and 50 states and territories).

[189]*Id*.

[190]The company has been criticized for an unpatched application vulnerability that allowed attackers to access the data. Michael Hill & Dan Swinhoe, *The 15 Biggest Data Breaches of the 21st Century*, CSO (July 16, 2021, 2:00 a.m.), https://www.csoonline.com/article/2130877/the-biggest-data-breaches-of-the-21st-century.html. Inadequate system segmentation made lateral movement easy for the attackers. *Id*.

[191]Tarunima Prabhakar & U.C. Berkeley Ctr. for Long-Term Cybersecurity, A New Era for Credit Scoring: Financial Inclusion, Data Security, and Privacy Protection in the Age of Digital Lending 14 (2020), https://cltc.berkeley.edu/wp-content/uploads/2020/06/A_New_Era_for_Credit_Scoring.pdf.

[192]Yu et al., *supra* note 134, at 7. This is especially troubling considering that data breaches have been common even among CRAs with extensive compliance programs. *See* Andriotis et al., *supra* note 2; *see also* Pascual & Marchini, *supra* note 2 (describing the Equifax data breach that exposed the personal information of 147 million people).

[193]Yu et al., *supra* note 134, at 7; *see also* Andriotis et al., *supra* note 2; *see also* Pascual & Marchini, *supra* note 2. In October 2013, the press reported that an Experian subsidiary sold data to an alleged identity theft operation. Senate Report, *supra* note 165, at 14.

[194]Prabhakar & U.C. Berkeley Ctr. for Long-Term Cybersecurity, *supra* note 191, at 14.

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their data may be stored for an unlimited period of time, even after an account becomes inactive.[195]

5. Alternative Uses, Alternative Impacts

As CRAs have diversified their operations into risk scoring and consumer profiling, they are no longer merely concerned with credit-worthiness.[196] They also operate in the more expansive business of

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[195]Upstart's terms state that, "By authorizing the Account Access Service, you also agree to Service Provider's privacy policy … which states that your Account Information may be accessed by the Service Provider on a continuous basis and retained by the Service Provider indefinitely even after your loan is terminated." *Account Access Service Terms*, UPSTART (Sept. 18, 2018), https://www.upstart.com/account_verification_service_terms. Upstart uses the data technology company called Plaid for its platform. Plaid's user agreement states that, "As permitted under applicable law, even after you stop using an application or terminate your account with one or more developer, we may still retain your information." *Legal*, PLAID, https://plaid.com/legal/#consumers (last visited Jan. 15, 2021). When the Gramm-Leach-Bliley Act was enacted 1999, it was thought to address concerns relating to the privacy and security of personal data and to apply to all credit data, including certain alternative data, because it applies to "nonpublic personal information." Section 6801 applies to "nonpublic personal information," which is limited to personally identifiable financial information provided by a consumer or resulting from any transaction or any service performed for the consumer or otherwise obtained by the financial institution. Julia Alpert Gladstone, *Data Mines and Battlefields: Looking at Financial Aggregators to Understand the Legal Boundaries and Ownership Rights in the Use of Personal Data*, 19 J. MARSHALL J. COMPUTER & INFO. L. 313, 324 (2001). The agency responsible for establishing and enforcing these safeguards varies depending on the institution holding the data. CONG. RES. SERV., FINANCIAL SERVICES AND CYBERSECURITY: THE FEDERAL ROLE 17–18 (Mar. 23, 2016), https://crsreports.congress.gov/product/pdf/R/R44429. The GLBA delegated the authority for federal consumer privacy provisions to the federal banking regulators for federally insured depository institutions; the Securities and Exchange Commission for brokers, dealers, investment companies, and investment advisors; state insurance regulators for insurance companies; and the FTC for all other financial institutions. *Id*. The FTC has proposed amendments to the Safeguard and Privacy rules under the GLBA that would require all nonbank financial institutions to encrypt all customer data, implement access controls to prevent unauthorized users from accessing customer information, and use multifactor access authentication. Press Release, FTC, FTC Seeks Comment on Proposed Amendments to Safeguards and Privacy Rules (Mar. 5, 2019), https://www.ftc.gov/news-events/press-releases/2019/03/ftc-seeks-comment-proposed-amendments-safeguards-privacy-rules. Importantly, the amendment would expand the definition of "financial institution" to include "finders" who charge a fee to connect consumers who are looking for a loan to a lender. *Id*. However, the applicable enforcement agencies have little upfront supervisory or enforcement authority and thus must rely upon enforcing the GLBA after an incident has occurred. CONG. RES. SERV., FINANCIAL SERVICES AND CYBERSECURITY: THE FEDERAL ROLE 18–19 (Mar. 23, 2016), https://crsreports.congress.gov/product/pdf/R/R44429.

[196]LAUER, *supra* note 24, at 266.

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consumer data.[197] In addition, CRAs have long been selling credit reports for noncredit decisions, such as setting insurance premiums and even employment decisions.[198] With big data already having a strong foothold in college admissions,[199] dating,[200] and criminal sentencing,[201] credit data will inevitably enter the mix.[202] The continued consolidation of data, combined with many regulatory loopholes, opens the door for a greater expansion of consumer data uses.

Because application of the FCRA turns on whether the information an entity collects and sells constitutes a "consumer report," CRAs have been able to maintain databases that include thousands of data points on indi-

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[197] *Id.*

[198] According to the FCRA, credit bureaus may only sell information in their files for limited purposes, including for use in credit, insurance, or employment decisions. 15 U.S.C. § 1681a(d)(1) (2015). If the contents of a credit file are shared, however, then the consumer must either consent or be given a "firm offer" of credit or insurance. *Id.* § 1681b(c) (2015). Since the 1980s, financial institutions have leveraged this loophole, using statistical models based on credit bureau data to determine to which consumers they should send pre-approved credit offers. Lauer, *supra* note 24, at 248–49. Although prescreening is touted as beneficial for consumers, the historic practice of redlining, combined with the current practice of targeting vulnerable populations for high-interest loans (both as described in Part II), illustrate how this loophole provides opportunities for discriminatory and abusive practices.

[199] *See* Douglas MacMillan & Nick Anderson, *Student Tracking, Secret Scores: How College Admissions Offices Rank Prospects Before They Apply*, Wash. Post (Oct. 14, 2019, 5:02 p.m.), https://www.washingtonpost.com/business/2019/10/14/colleges-quietly-rank-prospective-students-based-their-personal-data/ (reporting that colleges are building vast repositories of data on prospective students that include test scores, zip codes, transcripts, academic interest, web browsing histories, ethnic backgrounds, and household incomes).

[200] *See* Paul Rubens, *Is Big Data the Key to Long-Lasting Romance*, BBC News (Mar. 25, 2014), https://www.bbc.com/news/business-26613909 (reporting that dating services are gathering information from customer's social media pages to make better dating matches).

[201] *See* Christopher Slobogin, *Risk Assessment*, *in* Oxford Handbook of Sentencing and Corrections 199, 203–05 (Joan Petersilia & Kevin R. Reitz eds., 2012) (describing the use of risk assessment in criminal sentencing that analyzes myriad factors, including criminal history, financial means, and employment).

[202] *See* also Michelle Singletary, *Looking for Love? A Poor Credit Score Can Make You Less Attractive on the Dating Scene*, Wash. Post (May 11, 2017, 7:10 a.m.), https://www.washingtonpost.com/news/get-there/wp/2017/05/11/looking-for-love-a-poor-credit-score-can-make-you-less-attractive-in-the-dating-scene/ (reporting on the site creditscoredating.com, an online dating site that matches people based on their self-reported credit scores).

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vidual consumers for marketing purposes.[203] In the early 1990s CRAs faced challenges relating to the legality of their database marketing operations,[204] and as a result, Equifax abandoned its mailing list services, and TRW (now Experian) entered into a consent agreement with the FTC that prevented the company from continuing its marketing list business.[205] In 1993, however, the consent agreement was amended to allow TRW to use "identifying information" from its credit database for list marketing purposes.[206] This change quietly opened the door for CRAs once again to use this information for database marketing purposes in the way that other list brokers and database marketers can use the information.[207] The ability of CRAs to maintain marketing databases, as well as their credit reporting databases, contributes to information asymmetry that leaves individual consumers powerless.

Even traditional credit data can be aggregated at a household or neighborhood level without triggering FCRA requirements.[208] Information will not be considered a consumer report unless it pertains to an

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[203]And as the CRAs have moved into database marketing, the line between credit reporting and marketing operations has blurred. LAUER, *supra* note 24, at 259. Prior to the 1996 Amendments, the FCRA allowed CRAs to sell their information to any party with "a legitimate business need for the information in connection with a business transaction with a consumer." 15 U.S.C. § 1681b(3)(E) (1989). According to the CRAs, direct mail and consumer profiling programs constituted a "legitimate need." LAUER, *supra* note 24, at 261.

[204]LAUER, *supra* note 24, at 262.

[205]*Id*.

[206]F.T.C. v. TRW, Inc., 784 F. Supp. 361 (N.D. Tex. 1991), *modified*, FTC v. TRW, Inc., No. 3-91-CV-2661-H (N.D. Tex. Jan. 14, 1993). Information at the top of the credit report would be exempt from the FCRA rules. LAUER, *supra* note 24, at 262. Credit data held by a CRA may either be a consumer report subject to the regime of the FCRA (referred to as "below the line") or available for all purposes, including marketing (referred to as "above the line"). ROBINSON & YU REPORT, *supra* note 13, at 17.

[207]In 2000, the FTC ordered Trans Union to stop selling target market list to marketers who lack an authorized purpose under the FCRA. Trans Union Corp., FTC, Opinion of the Commission 1 (Mar. 1, 2000), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2000/03/transunionopinionofthecommission.pdf. Trans Union's target market lists were based on information regarding consumers' credit limits, open dates of loans, number of tradelines, types of tradelines, and existence of tradelines. *Id*. at 18–25. As the use of such information allowed marketers to make inferences about an individual's creditworthiness, the lists were "consumer reports" under the FCRA. *Id*. at 2, 22. The FTC still upheld the ability of CRAs to use "above the line" data for all purposes including marketing. *Id*. at 12.

[208]ROBINSON & YU REPORT, *supra* note 13, at 17.

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individual or identifiable person.[209] CRAs have made use of this loophole by converting credit data into nonindividualized scores that can be as sensitive as an individual's credit score.[210] These nonindividualized scores, which are calculated at a household or block level, are the primary method by which CRAs sell credit data for marketing purposes.[211] The scores are strikingly similar to credit scores in that they "enable [] credit grantors, insurance companies, and other firms to utilize an aggregated version of the industry accepted credit risk assessment measure,"[212] to rank households on their "likelihood to perform,"[213] and to "specifically estimate[] household deposit balances."[214] By injecting baseline credit data into the online tracking and advertising industry through the use of these scores, CRAs facilitate targeted marketing practices and the offering of "products [that] run contrary to the spirit of fair credit reporting law."[215]

Whether a particular reporting activity falls under the FCRA depends not only on the type of information used but also whether the entity involved is a CRA.[216] Under the FCRA, CRAs "regularly engage[] … in the practice of assembling or evaluating consumer credit information or other information on consumers" for "monetary fees, dues or on a cooperative non-profit basis" and for the "purpose of furnishing consumer reports to third parties."[217] Due to the narrowness of this definition, an online lender that collects its own data to analyze creditworthiness would

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[209]*See* McCready v. EBay, Inc., 453 F.3d 882, 889 (7th Cir. 2006) (applying the FCRA and holding that information pertaining to an anonymous username does not qualify under definition of "consumer report").

[210]Robinson & Yu Report, *supra* note 13, at 17.

[211]*Id.*

[212]*Aggregated FICO Scores*, Equifax, https://www.equifax.com/business/aggregated-fico-scores/ (last visited Nov. 28, 2020).

[213]*Profitability Score*, Experian, https://www.experian.com/marketing-services/profitability-score (last visited Nov. 28, 2020).

[214]*Household Deposits Score*, Experian, https://www.experian.com/assets/consumer-information/product-sheets/household-deposits-score.pdf (last visited Nov. 28, 2020).

[215]Robinson & Yu Report, *supra* note 13, at 18.

[216]The FCRA applies to "consumer reporting agencies." 15 U.S.C. § 1681(a) (2011).

[217]*Id.* § 1681a(f).

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not trigger the FCRA requirements.[218] Moreover, the FCRA specifically excepts actors that only acquire data first-hand from consumers,[219] thus newer lenders that base credit decisions on information collected from consumers themselves need not comply with the Act. Many data aggregators would likely fit the consumer reporting agency definition under the Act, and they attempt to evade compliance by using disclaimers that state that the providers are not "consumer reporting agencies" and that their reports should not be used for purposes set out in the FCRA.[220] Although the FTC has warned companies that such a disclaimer is not sufficient to avoid FCRA coverage,[221] the widespread use of disclaimers in the data industry continues.[222]

Further, even when the FCRA applies, there are evidentiary barriers that hinder enforcing FCRA claims. For example, in *Tailford v. Experian Info. Solutions, Inc*., the court dismissed the plaintiffs' claims, in part, because plaintiffs failed to sufficiently plead "willfulness, recklessness, and negligence" in that their allegations were "unsupported by facts pertaining to Experian's *mens rea*."[223] In spite of the fact that Experian had sold non-financial personal data to a third party and failed to disclose the same data to the plaintiffs, the court stated that the FCRA only imposes civil liability on a CRA when it is "either negligent or willful in failing to comply with any

[218]Hurley & Adebayo, *supra* note 68, at 187.

[219]15 U.S.C. § 1681a(d)(2)(A)(i) (2015).

[220]Hurley & Adebayo, *supra* note 68, at 187. Some data aggregators, such as Finicity, accept that they are consumer reporting agencies and thus regulated by the FCRA. SAUNDERS & NAT'L CONSUMER LAW CTR., *supra* note 61, at 7. Others claim to be "dumb pipes" funneling data to end users. *Id*.

[221]*In re* Filiquarian Publishing, L.L.C., Choice Level, LLC & Joshua Linsk, Docket No. C-4401 (FTC May 1, 2013) (final decision and order).

[222]*See* YU ET AL., *supra* note 134, at 26 (providing a sample list of disclaimers used by aggregators).

[223]Tailford v. Experian Info. Solutions, Inc., No., No. SACV 19-02191JVS(KESx), 2020 WL 2464797, at *7 (C.D. Cal. May 12, 2020) (emphasis added). The plaintiffs sued Experian after a data breach revealed that Experian had provided 248 columns of specific datapoints to Alteryx through its ConsumerView product, yet most of this information was not disclosed to the plaintiffs in their consumer reports provided by Experian pursuant to §1681 (g) of the FCRA. *Id*. at *1–3.

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requirement imposed under the FCRA."[224] This standard places an extraordinary burden on plaintiffs that ultimately leads to underenforcement of the FCRA.

III. Alternative Solution: Credit Rating Oversight

As described in Part II, the use of expansive data types to produce consumer credit scores is either porously regulated or largely unregulated. Within this environment, some argue that the innovation taking place within new credit rating products, using granular personal data, may offer at least a partial solution to the systemic problems of the credit underserved and low credit communities.[225] While extending access to credit equitably across society is imperative, the circumstances under which access to viable credit is made available should not exacerbate the same inequities that the cure seeks to address. To protect consumers and mitigate against harmful and exclusionary forms of alternative data solutions, it is important to adopt approaches that will best serve the goals of individual fairness, public good, and economic benefit.

Although various laws and regulations apply to particular aspects of credit decisioning, as discussed in Part II, these laws and regulations contain substantial loopholes that largely predate the use of alternative credit data and scoring. Moreover, enforcement is problematic. Even when covered entities engage in behavior that should trigger enforcement, federal agencies have taken an "innovation-friendly" approach toward the regulation of alternative credit data.[226]

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[224]Banga v. Experian Info. Solutions, Inc., No. C 09-04867 SBA, 2013 WL 5539690, at *6 (N.D. Cal. Sept. 30, 2013).

[225]*See*, for example, CFPB Taskforce Report Volume II, *supra* note 16, at 6 ("Alternative data can potentially increase predictive power of underwriting and pricing models used by financial institutions, allowing institutions to expand access to credit to individuals previously considered uncreditworthy under traditional models.").

[226]*See id*. at 9 (urging regulators to "exercise caution in restriction of the use of nonfinancial alternative data"); *Innovation at the Bureau*, CFPB, https://www.consumerfinance.gov/rules-policy/innovation/ (last visited Jan. 20, 2021) (describing policies that reduce barriers to innovation).

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Statutory amendments can strengthen consumer protection and fair lending and should be enacted. There are limits to the statutory amendment approach, however, and greater oversight is required to dismantle the opaque environment of credit scoring. Because access to a fundamentally fair individual credit score is a necessity in modern society, a quasi-utility oversight solution is proposed herein to achieve fair credit access for consumers.

A. Statutory Amendments to Fair Lending Statutes

In light of the enforcement barriers and regulatory gaps discussed in Part II, this section considers statutory amendments that could strengthen consumer protection and fair lending, and it analyzes the limits of these protections absent a more robust oversight framework.

When the ECOA was introduced in the Senate in 1975, then Senator Joe Biden stated that "[i]n many cases credit is virtually a necessity if consumers are to participate in the fruits of our American economy," and that "[i]n this marketplace it is intolerable that some consumers—because of the accident of their age, or color or ethnic origins—should be foreclosed from their equitable share of credit."[227] Similar reasons for amending the fair lending statutory amendments are present today. Translating the quoted observation into 2022, for most consumers, participation in the benefits of the U.S. economy is impossible without maintaining a credit score, yet scoring systems are opaque and error-prone. A significant part of alternative lending is based on inferences derived from fringe consumer data that are fed into algorithmic models, which harkens back to the early days of lending when a person's reputation in their neighborhood determined whether they would receive a loan.

During House of Representative hearings in 2019[228] that investigated the broken consumer credit industry, Representative Maxine Waters presented draft legislation, the Comprehensive Consumer Credit

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[227] Francesca Lina Procaccini, *Stemming the Rising Risk of Credit Inequality: The Fair and Faithful Interpretation of the Equal Credit Opportunity Act's Disparate Impact Prohibition*, 9 Harv. L. & Pol'y Rev. S43, S60 (2015).

[228] *Who's Keeping Score? Holding Credit Bureaus Accountable and Repairing a Broken System: Hearing on Consumer Credit Reporting*, 116th Cong. (2019) (testimony of Chi Chi Wu, Staff Attorney, Nat'l Consumer Law Ctr.).

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Reporting Reform Act,[229] that, among other provisions, would amend the FCRA, expand the power of the CFPB to validate credit scoring models and their predictive effect, grant the CFPB power to prohibit the use of certain forms of "inappropriate"[230] information that do not contribute to the accuracy of a credit rating,[231] task the CFPB with reviewing credit scoring methods every two years,[232] and require the CFPB to undertake a study of alternative credit scoring and consider many of the deficiencies discussed in this article, such as the effect of alternative credit scoring on privacy and its impact on minority communities.[233] Consumer credit scoring regulation is long overdue, and the draft contains many important protections. Yet, in order for fair lending statutes to fulfill their intended purposes and to address the many regulatory gaps discussed in Part II, further amendments are necessary.

To allow for effective enforcement of the FCRA and ECOA, any credit reform legislation must also reduce the extraordinary evidentiary burdens that are currently placed on plaintiffs.[234] Further, CRAs, which already have special access to individuals' financial histories, should be prohibited from selling nonfinancial data and aggregated credit data for marketing purposes. Any amendments should also extend the current FCRA protections, such as sharing limitations and procedures to correct inaccuracies, to alternative data as well. The proposed requirement for a two-year review of credit scoring products by the CFPB is too attenuated from the fast-paced development of algorithmic decision making, and what is appropriate for predictive decision making is too often in the eyes of the beholder. While the proposed legislation is a positive step forward, for alternative credit data

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[229]Comprehensive Consumer Credit Reporting Reform Act, 116th Cong. (2019), https://financialservices.house.gov/uploadedfiles/comprehensive_consumer_credit_reporting_reform_act_02262019.pdf (Discussion Draft). The U.S. House Committee for Financial Services has revived discussion of this and other related legislation. *See Hybrid Hearing*, *supra* note 9; *see also* Waters, *supra* note 10.

[230]Comprehensive Consumer Credit Reporting Reform Act, 116th Cong. § 501(1) (2019), https://financialservices.house.gov/uploadedfiles/comprehensive_consumer_credit_reporting_reform_act_02262019.

[231]*Id.*

[232]*Id.*

[233]*Id.* § 502.

[234]*See* CFPB Consumer Laws and Regulations, *supra* note 174; *see also* Taylor, *Proving Racial Discrimination and Monitoring Fair Lending Compliance*, *supra* note 176, at 227–28.

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systems to deliver on the promise of expanded access, participants in the credit infrastructure should be required to meet standards and duties of care before products can be used for credit decisioning.

B. Overarching Privacy Protection Legislation

The use of broad data about a person in alternative credit scoring significantly implicates privacy concerns. As applied to CRAs and fintech companies, individuals without economic privilege may have no choice but to submit to data surveillance, described as a "'data tax' on those who have little to offer but their quantified selves. Increasingly, those who cannot pay with money pay with privacy and information."[235] As a type of economic coercion, this submission is a high price to pay given that all of a consumer's spending decisions can be accessed and interrogated whenever their accounts are monitored directly to harvest information.

The protection of privacy and personal data in the United States is the subject of significant discussion, debate, and scholarship, and applies to the use of data for credit scoring.[236] Privacy is an essential individual right. While no such law currently exists, an overarching privacy law in the United States similar to Europe's General Data Protection Regulation (GDPR) or the California Privacy Rights Act (CPRA)[237] could encompass credit infrastructure-

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[235]Mark Kear, *Playing the Credit Score Game: Algorithms, "Positive" Data and the Personification of Financial Objects*, 46 ECON. & SOC'Y 346, 364 (2018).

[236]*See*, for example, Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119, 149 (2004); Jordan M. Blanke, *Privacy and Outrage*, 9 CASE W. RES. J. L. TECH. & INTERNET 1 (2018); Joel R. Reidenberg et al., *Privacy Harms and the Effectiveness of the Notice and Choice Framework*, I/S: J. L. & POL'Y FOR THE INFO. SOC'Y 485, 490–96 (2015); Kimberly Houser & W. Gregory Voss, *GDPR: The End of Google and Facebook or a New Paradigm in Data Privacy?*, 25 RICH. L. J. & TECH. 1 (2018).

[237]The CPRA provides Californians the right to access collected personal information, the right to delete such information, and the right to opt out of the sale (for monetary consideration) of their personal information. CAL. CIV. CODE §§ 1798.100, 1798.105, 1798.120 (West 2020). Other states have enacted or are in the process of enacting privacy laws as well, including Virginia, Washington, and New York. Like the CPRA, the newly enacted Virginia Consumer Data Protection Act allows Virginians to access their data, request their data to be deleted, and to opt out of the sale (for monetary consideration) of their data. H.R. 2307, Special Sess. (Va. 2020) (codified as amended at VA. CODE. ANN. §§ 59.1-571–59.1-581). The proposed Washington Privacy Act would also include the right to opt out of the sale of their data, as well as the right to opt out of the processing of personal data that is processed for the purposes of targeted advertising, sold to third parties, or used for certain types of profiling decisions. S.R. 5062, 67th Leg., Reg. Sess. (Wash. 2021). New York recently prohibited consumer reporting agencies and lenders from using certain information, including social media connections and networks, to determine an individual's creditworthiness. N.Y. GEN. BUS. LAW § 380-j (McKinney 2019).

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related protection, including Fair Information Privacy Practices related to notice, choice, accuracy, and limited use.[238] However, some argue that within a data surveillance society, these privacy rights are too difficult to enforce, and that it is too challenging for individuals to understand and effectively exercise their rights.[239] These arguments resonate even more strongly in the consumer credit context given the industry's complex credit infrastructure and opaque algorithmic decision structures.[240] We propose an integrative solution with oversight focused specifically on the consumer credit infrastructure,[241] and we build upon arguments that credit is a necessity, that credit infrastructure is a type of new utility,[242] and that credit infrastructure participants owe fair credit duties to the public.

C. Quasi-Utility Oversight of Consumer Credit Infrastructure

Consumer credit fuels spending that is a significant component of the U.S. economy, and its stability is essential for national security. The consumer mortgage market exemplifies this dynamic. The 2008 consumer mortgage collapse that led to the 2009 financial crisis occurred, in part, because of the weaknesses of the commercial credit rating model and the abandonment of consumer credit risk calculations in favor of unethical consumer lending practices.[243] Historic mortgage defaults were tied to

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[238] Cal. Civ. Code § 1798.130(a)(5)(A)–(C), 1798.100(d), 1798.105(a), 1798.120(a).

[239] *See* Geoffrey A. Fowler, *Don't Sell My Data! We Finally Have a Law for That*, Wash. Post (Feb. 19, 2020), https://www.washingtonpost.com/technology/2020/02/06/ccpa-faq/?arc404=true (describing the arduous steps that individuals must take to exercise their rights under California's law, including making requests to each and every company, proving your identity, or completely closing your account); *see also* Kate Crawford & Jason Schultz, *Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms*, 55 B.C. L. Rev. 93 (2014); Neil Richards & Woodrow Hartzog, *The Pathologies of Digital Consent*, 96 Wash U. L. Rev. 1461 (2019); Emma Trotter, *Patron Data Privacy Protection at Public Libraries: The Ethical Model Big Data Lacks*, N.Y.U. Ann. Surv. Am. L. 73, 77 (2017).

[240] *See supra* notes 103–114 and accompanying text.

[241] Other scholars have proposed statutory solutions. *See* Hurley & Adebayo, *supra* note 68, at 202–11 (describing a Model Fairness and Transparency in Credit Scoring Act).

[242] *See* K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 Cardozo L. Rev. 1621 (2018) (proposing framework for regulation of new utilities).

[243] Fin. Crisis Inquiry Comm'n, The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States 118–22 (2011).

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improper ratings of individual creditworthiness due to predatory lending practices, and the result illustrates how a poor consumer credit rating system can lead to bank instability, loss of investor confidence, and national financial collapse.[244] Therefore, accurate credit data collection and processing for risk assessment purposes are fundamental to the soundness of the consumer credit market infrastructure. While consumer credit scoring systems feed into broader and publicly important financial market systems, the consumer credit scoring systems both define and limit access to credit for individual consumers. These two sides to the consumer credit infrastructure must be considered together.

1. Fair Consumer Credit Ratings as a Necessity

It is unassailable that an individual's access to credit is a requirement for financial success and for building individual financial stability.[245] At the most fundamental level, Justice Frankfurter's comments in 1930 still resonate, "[To] think of contemporary America without the intricate and pervasive systems which furnish light, heat, power, water, transportation, and communications, is to conjure up another world. The needs thus met are today as truly public services …"[246] Similarly, it is difficult to imagine a modern world today without consumer credit ratings and scores, so essential are they for contemporary life in the United States. As described in detail in Part II, the wide scope of data that is aggregated into predictive credit ratings is immense and intrusive. At the same time, the consumer credit score that permeates an individual's life falls within the category of a *necessity* for an individual's fundamental well-being,

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[244] This was not the only cause. For a general description of the causes of the financial crisis, *see* Andrew William Mullineux, *Financial Innovation and Social Welfare*, 18 J. FIN. REG. & COMPLIANCE 243, 251–52 (2010).

[245] *See* Vlad A. Hertza, *Fighting Unfair Classifications in Credit Reporting: Should the United States Adopt GDPR-Inspired Rights in Regulating Consumer Credit?*, 93 N.Y.U. L. REV. 1707, 1713 (2018) ("Access to credit has a tremendous impact on consumers' ability to build wealth."); Hurley & Adebayo, *supra* note 68, at 154.

[246] William Boyd, *Public Utility and the Low-Carbon Future*, 61 UCLA L. REV. 1614, 1638 (2014) (quoting FELIX FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 81 (1930)).

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similar to the way that access to water or roads has been legally regarded as a necessity.[247]

Accessibility and fairness in the provision of this necessity are essential. The scope of uses for credit ratings impacts the individual at a fundamental, personal level, with credit scores being used outside of the financial system for insurance, employment, and housing decisions.[248] For example, it is probably unsurprising, based on the U.S. healthcare payment system, that hospitals use patient credit ratings at the time of admission, but it may be surprising that hospitals increasingly use credit scores in treatment decisions.[249] Thus, access to an effective and fair system of consumer credit ratings is not only an economic necessity, but also a matter of broader individual rights, as its uses reach into the crevices of individual well-being.

In sum, "access to credit is increasingly regarded as a citizen's right in a modern society and those who do not have it are regarded as financially (and thus socially) excluded."[250] Consumer protections, economic development, and access to credit have each been discussed as human rights, or as predicates to the achievement of other human rights, such as health and food.[251]

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[247] *See Antitrust Division Banking Guidelines Review, Before the Antitrust Division of the Dept. of Justice* (Oct. 16, 2020), https://www.ftc.gov/system/files/documents/public_statements/1581730/chopra_-_comment_doj_banking_merger_guidelines.pdf (statement of FTC Commissioner Rohit Chopra & Prof. Jeremy Kress) (describing the effects of not having access to traditional financial services on low-to-moderate income communities, including increased eviction rates, use of check cashing, and rates of debt collection); *see also* Gregory Day, *The Necessity of Antitrust* 6 (Apr. 4, 2021) (unpublished manuscript) (on file with author) (describing necessities as "not entirely defined as being required for survival," but rather as goods and services that make possible social and economic well-being).

[248] *See* 15 U.S.C. § 1681a(d)(1) (2015); *see also id*. § 1681b(c).

[249] Mary F. Ebeling, *Uncanny Commodities: Policy and Compliance Implications for the Trade in Debt and Health Data*, 27 Annals Health L. 125, 134 (2018) (stating that credit bureaus have direct and complicated relationships to patients' protected health information, including that credit scores may be used such as to predict if a patient will follow medicinal directions).

[250] Mullineux, *supra* note 244, at 246.

[251] *See* Chris Fleissner, *Inclusive Capitalism Based on Binary Economics and Positive International Human Rights in the Age of Artificial Intelligence*, 17 Wash. U. Global Stud. L. Rev. 201, 221–37 (2018) (reviewing the state of international human rights and capitalism); *see also* David Kinley, *Human Rights Can Help Fix the Economy. Here's How,* World Econ. Forum (Dec. 11, 2018), https://www.weforum.org/agenda/2018/12/its-time-to-make-human-rights-part-of-the-global-financial-system/; *Human Rights and the Finance Sector,* UNEP Finance Initiative, https://www.unepfi.org/humanrightstoolkit/finance.php (last visited Jan. 12, 2020); Randeep Ramesh, *"Credit Is a Basic Human Right,"* The Guardian (Jan. 5, 2007, 10:30 a.m.), https://www.theguardian.com/world/2007/jan/05/outlook.development.

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For example, the ECOA can be seen as a civil rights statute because it was intended to dismantle racial, age, national origin, and religious discrimination.[252] No less true today, access to credit and fair economic terms are civil rights and human rights issues.[253] Thus, prospective administrative regulation could ameliorate inequality and increase access to economic necessities in the alternative data environment if such regulation integrates with a rights-based approach that addresses the intrusiveness of data collection and scoring. Moreover, an effective remedy for alternative credit data harms requires combining regulation with a quasi-utility concept that imbues credit participants with public duties to ensure fair access to credit.

2. Consumer Credit Infrastructure as a New Utility

Viewing the individual credit score as a necessity leads to a more balanced understanding of how credit ratings and scores impact financial systems and consumers, and it frames analogies for potential regulatory oversight. Though no present regulatory approach serves as an exact fit for the consumer credit rating system, businesses that provide necessities historically have been viewed with scrutiny for accessibility and fairness, with a tendency for agencies to regulate these businesses as essential facilities,[254] public utilities,[255] or common carriers.[256]

Utility-type regulation for modern businesses, such as broadband providers, faces criticism in some economic circles,[257] but the provenance of such regulation in law and society reveals parallels to a fair credit lending

[252]*See* Procaccini, *supra* note 227 (also arguing that disparate impact analysis should apply to the ECOA).

[253]*See id*. at S57–S61; *see also* Chrystin Ondersma, *Consumer Financial Protection and Human* Rights, 50 Cornell Int'l L.J. 543 (2017); Chrystin Ondersma, *A Human Rights Approach to Consumer Credit*, 90 Tul. L. Rev. 373 (2015).

[254]*See* Adam Thierer, *The Perils of Classifying Social Media Platforms as Public Utilities*, 21 Commlaw Conspectus 249, 264–66 (2013) (describing the law and economics of public utilities and essential facilities).

[255]*See* Mullineux, *supra* note 244, at 246 (similarly suggesting that "household finance is a utility in a modern society").

[256]Kevin Werbach, *Is Uber a Common Carrier?*, 12 I/S: J. L. & Pol'y for Infor. Soc'y 135 (2015); James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 Fed. Comm. L.J. 225, 252 (2002).

[257]*See* Thierer, *supra* note 254, at 286–97.

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proposal for today's credit infrastructure. Although the main foci in utility regulation today are the control of monopolies and the setting of reasonable prices, earlier iterations of utility regulation were innovative legal responses to the provision of necessities by private entities to ensure access and to establish a just price for those goods.[258] The doctrine of "just price" was embedded in early utility regulation to blunt the economic coercion that powerful entities could wield over the provision of necessities.[259] The hallmarks of regulatory oversight included price review and broader fairness considerations, such as nondiscrimination and equal access,[260] to protect against coercion in the face of economic imbalance.[261] Over time, economic analysis of utility regulation shifted to a preference for market mechanisms to determine price, and to a deregulatory rather than a regulatory approach for controlling the coercive power of private parties who provide public goods.[262] In today's new environment of modern platforms, however, there is a return to a robust discussion of utility-type regulation, and its sister, common carrier regulation.[263] Utility regulation has been proposed as a remedy for the power

[258]William Boyd, *Just Price, Public Utility, and the Long History of Economic Regulation in America*, 35 Yale J. on Reg. 721 (2018). William Boyd provides an insightful and detailed narrative of the emergence and evolution of utility and price regulation, from medieval times to the present day. *Id*. at 745.

[259]*Id*. at 753, 758.

[260]*See* K. Sabeel Rahman, *Constructing Citizenship: Exclusion and Inclusion Through the Governance of Basic Necessities*, 118 Colum. L. Rev. 2447, 2456 (2018) (describing similar public utility and regulatory reformer norms and strategies); Jennifer Shkabatur, *The Global Commons of Data*, 22 Stan. Tech. L. Rev. 354, 402 (2019).

[261]Boyd, *supra* note 258, at 738, 761. Boyd also connects the concept of moral economy, stating, "Moral economy and just price always operated within the context of existing power relations and class conflict, serving chiefly to regulate the provisioning of necessities in order to maintain social order." *Id*. at 742. Boyd writes, "When put into practice through rate regulation, the effort could be viewed as an ambitious experiment aimed at realizing the goals of commutative justice in the context of the complex industrial order taking shape in twentieth century America." *Id*. at 760.

[262]*Id*. at 769–75.

[263]*See*, for example, Rahman, *supra* note 242, at 1635; Max N. Helveston, *Consumer Protection in the Age of Big Data*, 93 Wash. U. L. Rev. 859, 907–09 (2016) (discussing insurance as a necessity, and the inadequacy of regulatory protection for societal values as applied to data used for insurance); Werbach, *supra* note 256, at 143–44 (describing utilities as having societal significant markets, connection infrastructure, tendency toward monopolies, and personal information privacy challenges).

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imbalance between data collectors and individuals, especially when seen through the lens of privacy protection.[264]

The credit score is part of a costly infrastructure; it has no value standing alone. A consumer credit rating or score for one individual, standing by itself outside of a greater infrastructure of consumer ratings, would never be produced. The cost of collecting the information to produce one score is prohibitive, and one credit score has little value when it cannot be compared and placed in context with groups of similarly situated consumers. At the individual consumer level, however, the credit rating is personal; a score above a certain number is a requirement to finance a car, rent or buy housing, and even in some circumstances, to get a job. Credit bureaus and fintech companies have power over consumers because of these realities, and consumers have little ability to assess, compare, or choose the scoring,[265] or to enter into any competitive marketplace where they take their data elsewhere for a better deal. In addition to the monetary pricing power imbalance, credit rating systems control data about individuals and operate as gateways to much of civic life and foundational economic opportunities. These dynamics magnify questions of fairness and coercion and implicate civil rights.

The "new utilities" framework proposed by Sabeel Rahman describes the regulation of modern entities in the financial sector that builds upon earlier goals of mitigating private power and muting the risk of discrimination in the supply of necessities, such as electricity.[266] Rahman frames the new utilities as an infrastructure problem, and he defines them as the *new modern* public goods, which exhibit production issues, downstream common uses, and vulnerabilities to exploitation.[267] Vulnerabilities exist because "loss of access introduces severe inequalities," which 'magnif[ies] the kinds of disparities and inequalities

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[264]*See* Thierer, *supra* note 254, at 253–64 (including other proposals for regulation).

[265]*See* Hurley & Adebayo, *supra* note 68, at 152.

[266]*See* Rahman, *supra* note 242, at 1636.

[267]*Id*. at 1641. The production element of the new utilities is in part parallel to the physical infrastructure of old utilities, such as bridges and roads, and includes "concentration among a few private providers on the one hand, or under-provision of the good in a more fragmented industry on the other." *Id*. Rahman describes downstream common uses as a social infrastructure, a "category of goods and services that enable a wide array of downstream uses for individuals and communities," including informational goods. *Id*. at 1641–42.

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of opportunit[ies] and well-being rife in today's economy."[268] To address this, he recommends regulatory responses that would "chang [e] the very structure of the financial market to ensure both equal and fair access to the core services."[269] Further, he proposes a new utilities framework that is based on maintaining three fundamental attributes for public goods, nondiscrimination, access, and stability,[270] by a regulatory structure that provides choices to: (1) create public options, (2) impose public duties, including common carriage, and (3) firewall core services.[271]

Credit scoring fits the new utility concept. As traditional credit scoring infrastructure includes powerful commercial entities that control the majority of scoring and information collection, credit scoring today has broad social impact for individuals, and loss of opportunities plague the unscored and underscored. At first glance, alternative credit scoring regimes might provide part of the recommended response by opening the industry to more participants and providing private options. But as described earlier, alternative data collection is also inherently discriminatory and opaque. While statutes could be amended to firewall core credit scoring services and prevent the use of credit scoring outside of a narrow use, the lack of public duties would still make alternative credit scoring ripe for exploitation. Thus, a quasi-utility oversight function is needed to address the inequities in the modern movement toward unbounded alternative credit data scoring.

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[268]*Id.* at 1642. Rahman summarizes:

These elements represent a modernized form of the Progressive Era concern with bigness and concentrated power. In other words, "infrastructure," for our purposes, can connote those goods and services which (i) have scale effects in their production or provision suggesting the need for some degree of market or firm concentration; (ii) unlock and enable a wide variety of downstream economic and social activities for those with access to the good or service; and (iii) place users in a position of potential subordination, exploitation, or vulnerability if their access to these goods or services is curtailed in some way." *Id.* at 1643.

[269]*Id.* at 1665. Rahman refers to restraining platform power, and credit scoring is similar to the platform economy that profits from third party information. *Id.*

[270]*Id.* at 1687.

[271]*Id.* at 1644–47.

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3. Fair Credit Duties

New utility-type regulation can ameliorate and mediate differential treatment in credit scoring to the extent that it can require fair credit practices and price fairness wherein the price is an individual's intimate data. Fair credit duties within a utility regulatory structure resonate strongly when considered in the unique situation where the consumer provides the credit utility with the raw materials, namely their individual data, that are used to create a good. Alternative data are unique because of their intimate connections with individual lives and the potential for individual harm that accompanies the opportunity for increased access to credit. Personal consumer data are the raw materials that, when combined and algorithmically analysis, create value for the scoring company and society by means of a robust risk assessment system. It is incumbent that individual rights are protected and based on fair "price," in the form of fair credit data rights, for the data received.

On the other hand, it can be argued that there are good reasons to use some sort of alternative data to expand access to credit and reach populations with little or no credit history. As it is difficult, if not impossible, to break out of the cycle of high-cost access to credit or no access at all,[272] alternative data may open access and help to break the cycle. If these purposes were the only reasons for obtaining alternative credit data, then there would be less concern over alternative credit data use. Credit scoring entities are not fiduciaries of consumers, however. They are for-profit corporations that seek more customers and higher returns, which under general circumstances would lead to efficiency and the best use of resources. However, alternative data credit scoring is not a generally occurring economic transaction over ordinary goods and services; the data is personally identifiable and increasingly fine-grained. Alternative data may include relationships between people, location information, values-based decision points, and communication content, to name a few examples. Because alternative data is fed into generally agnostic algorithms designed to identify correlations with credit risk, the values of individual rights can be lost in a mathematically created sorting process. The use of alternate data will be used to "predict and price risk with virtually

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[272]Luke Herrine, *Credit Reporting's Vicious Cycles*, 40 N.Y.U. Rev. L. & Soc. Change 305, 323–24 (2016).

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unlimited data and analytics,"[273] perhaps at the individual level, unless duties to protect individuals and their rights are adopted and implemented.

Participants in the credit scoring industry should bear responsibility for duties to serve the public[274] and to provide the necessity of a fair credit rating based on fair data principles. A data utility framework would shift the burden from enforcement by individual consumers to ex ante proactive duties in order to: (1) provide universal access to credit rating services, including consumer paths to improved credit ratings; (2) identify and mitigate discriminatory impact,[275] including impacts caused by algorithmic bias; (3) segment and protect alternative data from noncredit use; (4) explain and substantiate inferences of credit risk related to the data; (5) notify consumers of the use of alternative data for credit scoring and decisions; and (6) provide comparative credit scoring information. Credit industry participants should be required to provide affirmative evidence to utility-type regulators that they meet these duties. As with regulation of banks and publicly traded corporations, credit industry participants should be held to standards of care that can be audited and assessed to protect the public. Some financial institutions and fintech companies already take steps to design products that meet the majority of these duties;[276] standard imposition of the duties would level the playing field and raise the bar for fair credit opportunities.

4. Quasi-Utility Oversight

As Representative Waters, a Democrat, so accurately observed, "[t]o credit reporting bureaus, consumers aren't consumers. They are commodities."[277]

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[273] *See* Helveston, *supra* note 263, at 883.

[274] As a comparison, for a discussion of why banks owe public duties that include consumer protection and access to credit, *see* Mehrsa Baradaran, *Banking and the Social Contract*, 89 Notre Dame L. Rev. 1283, 1286, 1300–02 (2014).

[275] *See* Procaccini, *supra* note, 227 at S49–S72 (arguing that the disparate impact analysis is included in the ECOA).

[276] Saunders, *supra* note 61, at 7.

[277] Jim Puzzanghera, *Maxine Waters Proposes Consumer-Friendly Overhaul of Credit Reporting Industry,* L.A. Times (Feb. 26, 2019, 2:30 p.m.), https://www.latimes.com/business/la-fi-waters-credit-reporting-bill-equifax-20190226-story.html (quoting Rep. Maxine Waters as saying, "This commodification of consumers and their personal data is the core reason why our nation's consumer credit reporting system is broken.").

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In fact, the commodity created through traditional and alternative credit scoring is intimate and longitudinal consumer data. Consumer credit reform is a bipartisan issue. Representative Patrick McHenry, a Republican, stated that, "[w]e have three of you [major credit scoring agencies] not really competing and the consumers are the ones that are losing out … how does an oligopoly protect consumers?"[278] Hence, a data utility regulatory framework is needed to protect consumers and mitigate tendencies of credit scoring oligopolies.

A utility-type regulator[279] is also needed to adopt rules and standards that implement fair data duties, ensure access and nondiscrimination, develop steps for transparency, create a process for review and certification of algorithms, and bring consumer rights into the analysis of alternative data uses and limits. This adoption would help to set a reasonable "rate" that a data utility may "charge" a consumer in return for a credit score when it is predicated on the use of a wide swath of personal information. For example, a regulator may adopt rules that prohibit the use of specific individual data as an unreasonable charge, which would be a recommended firewalling under the new utilities approach.

The implementation of oversight for consumer credit ratings is not insurmountable. As a comparison, commercial credit ratings are subject to oversight so that investors will have the information necessary to assess risk.[280] Corporations and potential investors rely on Nationally Recognized Credit Rating Agencies (NRCRAs), certified by the Securities and Exchange Commission (SEC), to perform the analytics leading up to a

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[278]*Id.*

[279]Due to space limitations, we take no firm position on whether the regulatory framework could be implemented by an existing agency, such as the CFPB, which has the discretionary authority to do so. It is imperative, however, that the agency have the expertise and resources to fulfill the utility-type oversight. It is also essential that the regulatory structure be focused on credit scoring systems. Also note, that the proposal differs herein from the proposal adopted by then President-Elect Joe Biden in July of 2020, which calls for a public credit rating agency housed within the CFPB to compete with the CRAs initially and then ultimately replace the for-profit system altogether. Amy Traub, *Establish a Public Credit Registry*, DEMOS (Mar. 2019), https://www.demos.org/sites/default/files/2019-03/Credit%20Report_Full.pdf.

[280]Chuan Duan & Elisabeth Van Laere, *A Public Good Approach to Credit Ratings—From Concept to Reality*, 36 J. BANKING & FIN. 3239, 3243 (2012). ("There is little doubt that credit ratings are essential to the proper functioning of modern financial markets, with inaccurate ratings having significant adverse effects and huge potential spillover into different parts of the economy.").

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securities[281] rating. NRCRAs are private entities whose business model rests on issuers paying for ratings.[282] In addition, before choosing a rating agency and paying a fee, an issuer may receive a pre-assessment, comparison shop between agencies, and make a choice based upon whichever agency it believes will afford the highest possible rating.[283] Just as commercial issuers seek the highest rating so that investors will regard the corresponding debt as less risky, so too consumers would benefit from an environment where they can take steps to increase their scores. Ratings by intermediaries are key elements in both cases. The differences between commercial and consumer credit ratings are due, in large part, to the oversight of the rating intermediaries. Commercial ratings are regulated by government-certified NRCRAs, while in comparison, consumer credit scores are produced in a sporadically regulated environment of data collection and aggregation by credit scoring and data entities. Under this framework, a consumer does not choose who calculates a score, or whether any entity will score them, and there is no competitive market in which they can individually participate to share their data. Their data are not their own, the price is extracted involuntarily, and the goods (the ratings) are provided regardless of individual consumer demand.

On its face, alternative credit scoring has the potential to change that dynamic by giving consumers a choice to seek out lenders that will consider different data to determine credit risk. Yet, the cost is high, and the choice may be illusory. An alternative credit product may on its face give a consumer a choice about whether to grant "permission" for the system to access her bank accounts in order to improve the system's visibility into factors that might grant or raise a credit rating. However, the subset of consumers that are mostly intended to benefit from alternative scores are those who have little actual choice or control in the matter. They lack

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[281]Securities include corporate debt instruments such as bonds, and in the case of the financial crisis were the mortgage-backed securities rated as investment grade pools. *See* Cassandra Jones Havard, *Too Conflicted to be Transparent: Giving Affordable Financing its "Good Name" Back*, 30 Legis. & Pub. Pol'y 451, 455–57 (2017) (discussing the failures of the rating process leading to the subprime mortgage crisis).

[282]Duan & Van Laere, *supra* note 280, at 3241.

[283]*Id.*

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access to the historical system, and economic coercion fuels their "choice" to participate.[284] In particular, there is a steep price for participation in an alternative scoring system, namely one's life in data. The consumer has no bargaining power, may be handicapped by historical and pervasive economic discrimination,[285] and is left with few options except to share daily life choices and personal connections with powerful institutions under opaque conditions.[286] Under this design, CRAs and fintech companies provide alternative credit ratings, but the credit may be differentially priced, and those who are less able to object are subjected to continuous monitoring of personal data. For the promise of alternative data scoring to be met, oversight that reviews the methods and impacts of alternative data scoring is necessary.

An analysis of the differing approaches taken by the CFPB and the Federal Housing Financing Agency (FHFA) in reviewing such methods and impacts should inform any new regulatory oversight plans. Through Project Catalyst, the CFPB issues no-action letters with respect to ECOA compliance that are conditioned upon the applicant providing data to the bureau.[287] For example, the CFPB issued the lender Upstart such a no-action letter, which was conditioned upon compliance with a risk management plan and quarterly audits.[288] The potential ECOA viola-

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[284]Frank Pasquale calls the targeting of desperate borrowers under the guise of fairness, "predatory inclusion." FRANK PASQUALE, NEW LAWS OF ROBOTICS 135 (2020).

[285]*See* Rice & Swesnik, *supra* note 135, at 940–43 (describing historic redlining as well as modern practices of subprime lending and proliferation of fringe lenders in communities of color).

[286]*See* Kear, *supra* note 235 ("[G]iving the poor and the financially excluded the means of conforming to the gaze of the 'surveillant assemblage' of banks, credit card companies and the CRAs should not be confused with emancipation from the subjectivizing apparatuses of financial government.").

[287]To spur "consumer-friendly innovation," the CFPB launched Project Catalyst in 2012. Press Release, CFPB Launches Project Catalyst to Spur Consumer Friendly Innovation, CFPB (Nov. 14, 2012), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-launches-project-catalyst-to-spur-consumer-friendly-innovation/.

[288]Upstart No Action Letter, *supra* note 181.

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tions arise from Upstart's use of fringe alternative data, including college major and grades, which can be highly correlated to race.[289] Due to the limited availability of reporting data, it is unclear whether the quarterly data provided by Upstart addresses fair data and lending principles sufficiently and whether the CFPB is involved in an assessment of the model.[290]

In contrast, the FHFA has adopted transparent standards and an assessment process for credit scores in the area of consumer mortgages. Even though the FHFA does not directly regulate consumer credit scoring, it adopts standards for the secondary consumer mortgage market, and its rules affect those products. As mentioned in Part II, Section 310 of the Economic Growth Act required that credit scores involved in secondary mortgage market requirements be validated and approved.[291] FHFA adopted final rules to this end in 2019[292] that include a baseline for fair lending in credit scores,[293] a certification process,[294] and an assessment.[295] Beyond the statutory requirements not to use data

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[289]Upstart describes the risks to consumers as those related to disparate impact to protected classes of applicants and higher prices. Request for a No-Action Letter from Upstart Network, Inc., to Consumer Financial Protection Bureau 6 (2017), *available at* https://files.consumerfinance.gov/f/documents/201709_cfpb_upstart-no-action-letter-request.pdf. Ultimately, Upstart requested an extension of the three-year CFPB no action letter for its automated alternative data model because "there is a lack of certainty regarding the sufficiency of the analysis required to confirm that the use of AI and facially neutral alternative variables do not have an unjustified disparate impact on applicants and borrowers." *Id*. at 9. Due to confidentiality, information about the model and impacts is limited, though Upstart states that the highest interest rate is an APR of 35.99%. *Id*. at 3.

[290]Further, despite the reports of positive impacts provided to the CFPB by Upstart, a recent study found that Upstart is charging higher interest rates on student loans to graduates of historically black or predominately Hispanic colleges, serving as one indication that the CFPB's monitoring is insufficient. Arnold, *supra* note 183.

[291]*See supra* Part II.

[292]In November of 2020, the Classic FICO credit score model was validated and approved. Press Release, Fed. Housing Fin. Agency, FHFA Announces Validation of Classic FICO for Use by Fannie Mae and Freddie Mac (Nov. 10, 2020), https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Announces-Validation-of-Classic-FICO-for-Use-by-Fannie-Mae-and-Freddie-Mac.aspx.

[293]12 C.F.R. 1254.6(a)(2) (2019).

[294]*Id*.

[295]12 C.F.R. 1254.8(b)(2) (2019).

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explicitly based on protected classes, the rules prohibit the use of highly correlated variables in any model, including proxies and correlations that are based on such classes. Furthermore, within the FHFA-approved process, it must be shown that "[a] reasonable, causal, and understandable relationship exists between variables used in the Model and credit risk."[296] Evaluation of the model for compliance with fair lending laws requires that the model be open for review and proxy testing, and that the enterprise assess the impact of the credit score on fair lending. This assessment requires an evaluation of the credit score disparate effects, outcomes, and access to credit.

While the FHFA adopted process is limited to a specific segment of the home mortgage market, it importantly shows that fair consumer credit scoring, along with the alternative data extracted as a price, can be assessed and that oversight procedures can be applied. In comparison with the ad hoc, confidential process of a no action letter by the CFPB, the FHFA rules are standard and consistent for all participants, apply statistical proxy testing, and require a broader assessment for fair lending impact. A faster and nimbler system for review could nonetheless include the factors in the FHFA principles, which would incentivize credit scoring providers to design fair lending concepts and processes into their models from the beginning. The same oversight body should also be responsible for privacy assessments in consumer credit scoring across all demographics, particularly addressing how scoring models potentially create a separate and unequal system for privacy and segmentation based on multiple measures of inequality.

Conclusion

Access to credit, controlled by credit rating agencies and scoring algorithms, is plagued by historical discrimination. All too often, it is nearly impossible for an individual to break out of a cycle of high interest rates and low credit ratings to participate in the benefits of the American economy. As one scholar notes, "Without access to credit on fair and reasonable terms, it can be extraordinarily expensive to be poor."[297] Further,

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[296] Fannie Mae & Freddie Mac, Joint Enterprise Credit Score Solicitation 24 (2020), https://singlefamily.fanniemae.com/media/22061/display.

[297] Johnson, *supra* note 70.

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while the use of some types of alternative data for credit ratings may prove partially helpful for addressing these historical problems, unregulated and opaque use of intrusive personal data can also perpetuate the cycle and create new inequalities and data disparities. While amendments to fair lending statutes and the addition of stronger privacy protections are important components of an effective response, requiring CRAs and fintech companies to meet duties to the consumer proactively within a quasi-utility oversight framework is also necessary to ensure fair lending practices across the consumer credit infrastructure. The necessity of fair credit scoring for the modern consumer compels continued oversight of the data-driven consumer credit infrastructure to ensure fair data practices and to hold the participants accountable.

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